March 13, 2000

IN RE: DOCKET NO. 2000-040-C – E.SPIRE/BELLSOUTH ARBITRATION

COPY OF **DIRECT TESTIMONY** OF JAMES C. FALVEY FILED ON BEHALF OF THE E.SPIRE HAS BEEN DISTRIBUTED TO:

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March 13, 2000

The Honorable Gary E. Walsh
SC Public Service Commission
Post Office Drawer 11649
Columbia, South Carolina 29211

RE: e.spire Communications, Inc. Petition for Arbitration with BellSouth Telecommunications, Inc.
Docket No. 2000-040-C

Dear Mr. Walsh:

In accordance with Order No. 2000-0124 in the above referenced Docket, we are filing the original and twenty-five copies of the prefiled testimony with exhibits of Mr. James C. Falvey.

Sincerely,

Russell B. Shetterly

RBS/tpb

Enclosures

cc: Parties of record w/enc.

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CERTIFICATE OF SERVICE

I, Tara P. Boone, do hereby certify that I have, on this the 13th day of March, 2000, caused the Testimony of James C. Falvey with exhibits to be served upon the following individuals by first class U.S. mail, postage prepaid.

Tara P. Boone

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BELLSOUTH TELECOMMUNICATIONS, INC.
675 West Peachtree Street, NE
Atlanta, Georgia 30375

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BEFORE THE
SOUTH CAROLINA PUBLIC SERVICE COMMISSION

In the Matter of	)	
	)	
Petition by e.SPIRE COMMUNICATIONS, INC.	)	
On Behalf of Itself and its Operating Subsidiaries	)	Docket No. 2000-040-C
in South Carolina, for Arbitration of an	)	
Interconnection Agreement with BELLSOUTH	)	
TELECOMMUNICATIONS, INC. Pursuant to	)	
Section 252(b) of the Telecommunications Act	)	
of 1996, as Amended	)	

DIRECT TESTIMONY
OF JAMES C. FALVEY
ON BEHALF OF
E.SPIRE COMMUNICATIONS, INC.
AND ITS OPERATING AFFILIATES

March 13, 2000

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I. Introduction

Q. PLEASE STATE YOUR NAME, TITLE AND BUSINESS ADDRESS FOR THE RECORD.

A. My name is James C. Falvey. I am Vice President – Regulatory Affairs for e.spire Communications, Inc. ("e.spire"), which formerly was known as American Communications Services, Inc. or "ACSI". My business address is 133 National Business Parkway, Suite 200, Annapolis Junction, MD 20701.

Q. PLEASE DESCRIBE YOUR PROFESSIONAL EXPERIENCE AND BACKGROUND.

A. Prior to joining e.spire as Vice President – Regulatory Affairs in 1996, I practiced law as an associate with the Washington, D.C. firm of Swidler & Berlin, Chtd. (now Swidler Berlin Shereff Friedman LLP). In the course of my practice, I represented Competitive Local Exchange Carriers ("CLECs"), Interexchange Carriers ("IXCs"), and cable operators before state and federal regulators. Prior to my employment at Swidler & Berlin, I was an associate in the Washington, D.C. office of the law firm of Johnson & Gibbs, where I practiced in the area of antitrust litigation. I graduated form Cornell University in 1985 with honors and received my law degree from the University of Virginia School of Law in 1990. I am admitted to practice law in the District of Columbia and Virginia.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to present e.spire's business position on each of the unresolved issues presented for arbitration in this proceeding.

Q. PLEASE BRIEFLY DESCRIBE THE OPERATIONS OF E.SPIRE AND ITS OPERATING SUBSIDIARIES.

A. e.spire seeks to be a leading facilities-based Integrated Communications Provider ("ICP") to small- and medium-sized businesses. The Company is one of the first Competitive Local Exchange Carriers ("CLECs") to combine the provision of voice services, such as dedicated access, local, and long distance, with advanced data services, such as frame relay, asynchronous transfer mode ("ATM"), Internet services and digital subscriber line ("DSL") services. The Company currently offers voice services in 38 U.S. markets (including markets in South Carolina) where it has state-of-the-art local fiber optic networks, and offers data services in 48 U.S. markets where it provides access to 387 data points-of-presence ("POPs"). e.spire operates large and capable Lucent 5ESS switches in South Carolina. Through its subsidiary, ACSI Network Technologies, Inc., e.spire also offers network design and construction services to CLECs, interexchange carriers ("IXCs"), corporations, and municipalities in selected markets in the U.S.

Q. HAS E.SPIRE INTERCONNECTED WITH BELLSOUTH?

A. Yes. e.spire and BellSouth executed an initial local interconnection agreement covering eight states in the BellSouth operating territory in July 1996 (the "ACSI-BellSouth Interconnection Agreement"). The ACSI-BellSouth Interconnection Agreement was scheduled to expire on September 1, 1998, but has been extended by mutual agreement of the parties until a successor agreement is executed. Pursuant to that initial ACSI-BellSouth Interconnection Agreement, e.spire has in fact established collocation arrangements and interconnected with BellSouth at numerous points. We have been exchanging local traffic for termination, purchasing UNEs and reselling local services for over three years under that agreement.

Q. BRIEFLY DESCRIBE THE PARTIES' EFFORTS TO NEGOTIATE A SUCCESSOR INTERCONNECTION AGREEMENT.

A. As the expiration date of the initial ACSI-BellSouth Interconnection Agreement approached, e.spire made a new request for interconnection to BellSouth pursuant to the terms of Sections 251-252 of the Telecommunications Act of 1996 ("1996 Act"). The parties conducted numerous meetings and conference calls to discuss literally hundreds of contract issues. Many draft agreements were exchanged. In our view, both parties negotiated in good faith, and most issues were successfully resolved through negotiation. Not surprisingly, however, the parties were unable to agree on a number of critical points, and e.spire is seeking Commission resolution of the disputed issues by arbitration in accordance with the terms of Section 252 of the Federal Telecommunications Act of 1996 (the "Act").

Q. PLEASE DESCRIBE HOW THE ISSUES ARE PRESENTED IN YOUR TESTIMONY.

A. e.spire composed a matrix of arbitration issues consisting of 63 discrete issues identified as outstanding between the parties at the time of filing of e.spire's Petition for Arbitration. This matrix is attached to the e.spire Petition for Arbitration as Attachment B. In BellSouth's answer to e.spire's Petition, BellSouth added one more issue, now designated as Issue 64. The current revised issues matrix is attached to my testimony as **"Exhibit 1"**. My testimony follows the order of presentation of the issues in the arbitration matrix, and has been indexed for ease of reference.

II. Discussion of Issues

Q. (ISSUE 1): SHOULD BELLSOUTH BE REQUIRED TO PAY LIQUIDATED DAMAGES FOR FAILURE TO (i) MEET SPECIFIED INTERVALS PRESCRIBED IN THE AGREEMENT FOR UNES, AND (ii) PROVIDE SERVICE AT PARITY AS MEASURED BY THE SPECIFIED PERFORMANCE METRICS?

A. Yes. e.spire believes that, in order to ensure the kind of performance that is necessary for the development of robust competition in the South Carolina local telecommunications market, BellSouth should be held to appropriate standards. If BellSouth fails to meet those standards, damages should apply. This is simply a practical consideration, reflecting the reality of the parties' dealings: if there are no "teeth" to the performance standards, BellSouth has little incentive to meet them, and considerable incentive to underperform.

When e.spire's customers are receiving a service that is partly dependent on BellSouth's facilities, BellSouth's failure to perform is ascribed to e.spire, and this creates an unfavorable impression of e.spire's capabilities. Since e.spire is not the incumbent carrier, and is a relatively new market entrant, it is particularly essential for e.spire to inspire confidence by its competence and responsiveness. Failure to live up to promises can cause a prospective customer to revert back to the incumbent carrier. So there is a built-in incentive for BellSouth to undercut e.spire's marketing efforts by creating the impression that e.spire is not as dependable as the incumbent.

Ironically, e.spire is required to pay BellSouth full price even for subpar services, and even when BellSouth's negligence or misconduct creates the false impression that e.spire has not performed, or is "dragging its feet." So if BellSouth is given a free hand to perform as it pleases, there is a danger that BellSouth may take the opportunity to engage in anticompetitive behavior through delays, negligence, avoidable errors, etc., that not only drive customers away from e.spire, but (perhaps more importantly) drive them back to the poorly-performing wholesaler, BellSouth. This is entirely unfair, and it greatly undermines the viability of competitive firms such as e.spire. The adoption by this Commission of performance standards requiring BellSouth to perform at parity with the services it provides to its own customers, with liquidated damages for failure to meet this standard, is admittedly not a guarantee of good performance. However, e.spire believes that such measures will at least ensure that BellSouth has the correct incentives to allow the growth of local competition. A liquidated damages proposal along these lines was adopted in Texas, and it has significant "teeth" that will create an incentive for improved performance. e.spire submits that the adoption of the Texas plan, or something similar, would greatly advance the progress of competitive entry in the South Carolina local telecommunications markets.

Q. (ISSUE 2): SHOULD FCC AND COMMISSION ORDERS THAT ARE "EFFECTIVE" OR "FINAL AND NON-APPEALABLE" BE INCORPORATED INTO THE AGREEMENT?

[Note: the foregoing issue was closed during follow-up negotiations between e.spire and BellSouth; therefore, no testimony is being offered on this issue.]

Q. (ISSUE 3): SHOULD A "FRESH LOOK" PERIOD BE ESTABLISHED WHICH PERMITS CUSTOMERS SUBJECT TO BELLSOUTH VOLUME AND TERM SERVICE CONTRACTS TO SWITCH TO E.SPIRE SERVICE WITHOUT IMPOSITION OF EARLY TERMINATION PENALTIES?

A. Yes. e.spire believes that it is not sufficient to simply open the starting gate for new market entrants and expect them to be able to compete toe-to-toe with the incumbent monopolist. As things currently stand, there is no level playing field on which e.spire and other competitive carriers can ply their trade. BellSouth has certain built-in advantages that make it difficult or impossible to compete effectively for certain customers. Apart from such unavoidable advantages such as BellSouth's ubiquitous network, its entrenched brand recognition, and a customer's natural resistance to change, there are types of unfair advantages that can be addressed effectively by regulators, greatly facilitating the entry of competition. One of these unfair advantages lies in the fact that BellSouth has executed volume and term agreements with certain classes of customers that enable them to realize discounts on their telecommunications services. These customers are especially resistant to change – not only because they have a "good thing going," but also because they will be penalized substantially if they change their service to a competitive provider.

BellSouth's volume and term contracts require customers to commit to certain volumes or terms with BellSouth in order to obtain a discount – and the effect of cancellation of such a contract is typically the recapture of the difference between the discounted rate and the full service rate, retroactively to the inception of the contract. In some cases, this could amount to tens of thousands of dollars: it is perceived by the customer as the "price" of changing carriers. This "cancellation penalty" built into BellSouth's volume and term contracts essentially ensures that very valuable customers do not switch over to competitive carriers for years at a time – because they cannot afford to – the penalties involved make it uneconomical. In effect, these contracts extend the BellSouth monopoly long past the date of the Telecom Act.

As long as BellSouth is signing up customers to these contracts, and competitors are still at a very low level of visibility, as new market entrants are today, BellSouth is able to extend its hold on the market. Only a "fresh look" at these contracts will determine whether the customer would have opted for BellSouth in a competitive market. Today, the customer may find that it can obtain the same benefits it received by making long-term commitments to BellSouth, simply by shopping around in the competitive marketplace, and without making long-term commitments in the future. That's how Americans typically obtain the best price, not through unpalatable long-term commitments. To get a discount on orange juice, you don't commit to buying the same brand for the next 5 years; you look on the shelf to find the best price for the best quality juice as between several competitors, week in and week out. That's competition.

If BellSouth is able to secure its most valuable, high volume, long term business customers with "golden handcuffs," it is difficult or impossible for new entrants to gain marketshare in crucial market segments. The best way to address this is to allow the customer a "fresh look," by mandating the removal of the "cancellation penalties" from BellSouth's volume and term contracts for the next two years, to allow new entrants to compete fairly for valuable business customers, and to gain some traction in the competitive market.

Q. BUT DOESN'T THIS UNFAIRLY INCENTIVIZE THE CUSTOMER TO LEAVE BELLSOUTH FOR A COMPETITIVE CARRIER?

A. No. It simply frees the customer to make, with the full knowledge of new competitive alternatives, the same decision -- without the coercion of a large cancellation penalty hanging like the sword of Damocles over its head. A competitive carrier is still going to have to demonstrate why its service is better, cheaper, more reliable, etc., than BellSouth. The competitive carrier will not automatically win a customer freed by "fresh look," because BellSouth is a known quantity, and the customer may or may not be persuaded to switch its service to new provider. But the chance to compete fairly – just the chance – is what e.spire and other competitive carriers are looking for. If BellSouth is allowed to "lock up" its most valuable customers and effectively throw away the key, the development of competition in local markets will be severely hampered.

Q. (ISSUE 4): SHOULD BELLSOUTH PROVIDE INTRALATA TOLL SERVICE TO E.SPIRE LOCAL EXCHANGE SERVICE CUSTOMERS ON THE SAME BASIS THAT IT PROVIDES INTRALATA TOLL SERVICES TO ALL CUSTOMERS OF BELLSOUTH LOCAL EXCHANGE SERVICES?

[Note: the foregoing issue was closed during follow-up negotiations between e.spire and BellSouth; therefore, no testimony is being offered on this issue.]

Q. (ISSUE 5): SHOULD THE DEFINITION OF "LOCAL TRAFFIC" INCLUDE DIAL-UP CALLING TO MODEMS AND SERVERS OF INTERNET SERVICE PROVIDERS ("ISPS") LOCATED WITHIN THE LOCAL CALLING AREA?

A. e.spire believes in general that it should be compensated for the costs it incurs when other carriers make use of its facilities. When BellSouth's customers place a call to an ISP whose facilities are connected to e.spire's network, e.spire must carry that BellSouth customer's call to the ISP over e.spire's facilities. The presumption is that e.spire constructs its network not to provide free service to BellSouth and its customers, but as an asset that earns revenues and will eventually enable e.spire to recover its substantial investment in South Carolina and turn its first profits. This goes for BellSouth, too. BellSouth builds its facilities for the purpose of earning a return (which, by virtue of rate regulation, it has consistently earned over most of this century), and reasonably expects to be compensated for calls carried over its network. In the case of a BellSouth customer's call carried by e.spire to an ISP connected to e.spire's network and located within the local calling area, the only way e.spire can be compensated is to receive reciprocal compensation for the call from BellSouth. There is no other mechanism presently existing that allows for BellSouth to compensate e.spire for such a call, and the use of e.spire's network. Treating this type of a call as "Local Traffic" within the confines of the Parties' interconnection agreement ensures that it will be subject to reciprocal compensation. If it is not included in this definition, *e.spire will not be compensated for carrying it.*

Q. BUT WHY CAN'T E.SPIRE JUST CHARGE ITS ISP FOR SUCH CALLS?

A. First of all, since 1983, ISPs have been held under federal law to be exempt from access charges, so it is difficult to anticipate how e.spire could require an ISP to compensate e.spire for carriage of this traffic. But even if it were possible to reach agreement with ISPs, this would not be fair. Since the BellSouth customer voluntarily originates this call, choosing to be routed to an ISP networked to e.spire rather than to BellSouth, the customer is directly causing e.spire to incur the cost of carrying the call. So the BellSouth customer is most certainly the cost-causer in this instance, and to foist the cost associated with the call on the ISP or on e.spire is plainly unfair. BellSouth needs to pay for this type of call initiated by its customers, and recover the cost of this payment from rates charged to its customers, since they are, and should be financially responsible. Furthermore, if CLECs started charging ISPs access charges, while RBOCs could not by law do so, ISPs would terminate all service from CLECs immediately, and return to the RBOCs. This would give the RBOCs a monopoly on this critical class of customers.

Q. DOES THE FACT THAT DIAL-UP ISP TRAFFIC IS LARGELY INBOUND MAKE SUCH CALLING UNIQUE?

A. No. Dial-up ISP traffic is by no means the only traffic that is predominantly inbound. There are many other types of calls that have this particular characteristic: taxicab dispatches, pizza delivery companies, radio call-in lines, chat lines, etc. As a matter of fact, to find companies that have predominantly in-bound traffic, you can just open the yellow pages. It's a good bet that the established companies with the biggest advertisements in the yellow pages have a predominance of in-bound calls. If they didn't, they would be sorely disappointed.

Q. DO RELATIVELY LONG HOLDING TIMES FOR DIAL-UP ISP CALLS MAKE EXISTING RECIPROCAL COMPENSATION RATES INAPPROPRIATE?

A. No. Many types of local calls have relatively long holding times, for example, calls between teenagers in the evening, chat lines, telecommuting connections, etc. Other types of calls have shorter than average holding times, for example, calls to verify credit cards. The point is that reciprocal compensation rates were established by *averaging* all such traffic, and it is not appropriate to pull out any one category exclusively and claim that rates are set in response to that category.

Q. DOES THE FACT THAT THE COMMUNICATIONS WITH ISPS ARE DATA RATHER THAN VOICE TRAFFIC MAKE A DIFFERENCE?

A. No. The FCC emphasized again last month in the *Advanced Services Remand Order* that the interconnection obligations are the same – and, most importantly, the costs we incur are the same, whether it's data or voice traffic.

Q. SINCE THE FCC DECLARED THAT ISP-BOUND TRAFFIC IS "LARGELY INTERSTATE" IN CHARACTER FOR JURISDICTIONAL PURPOSES, IS IT IMPROPER TO TREAT IT AS LOCAL TRAFFIC?

A. No. First of all, the FCC's determination that this traffic is largely "interstate" is a matter of dispute that is presently on appeal. Second, in its Order, the FCC expressly differentiated its finding that the traffic was "largely interstate" in character from the question of its proper treatment for purposes of inter-carrier compensation. Finally, the FCC expressly granted the States authority to order reciprocal compensation for ISP traffic in interconnection arbitration proceedings. Many states have upheld payment of reciprocal compensation for ISP-bound traffic in the context of interconnection agreements and arbitrations.

Q. (ISSUE 6): SHOULD THE DEFINITION OF "SWITCHED EXCHANGE ACCESS SERVICE" AND "SWITCHED ACCESS TRAFFIC" INCLUDE VOICE-OVER-INTERNET PROTOCOL ("VOIP") TRANSMISSIONS?

A. e.spire believes that BellSouth's insistence on including VOIP transmissions in the definition of "Switched Access Traffic" is an attempt to regulate by fiat between the Parties to this agreement a type of telecommunications that is expressly excluded by state and federal regulators and legislators. Since 1983, ESP/ISP traffic has been exempt from regulation as a telecommunications service, and for good reason. It is simply improper for BellSouth to seek to change that status in the context of this interconnection agreement. VOIP transmissions and other forms of ESP/ISP traffic should continue to be outside the definition of "Switched Access Traffic" unless and until legislators and/or regulators clearly specify otherwise. This issue is expected to be addressed by the FCC in the coming months. Until such time, creating a patchwork of different arrangements around the country would not only prove unworkable, but could suppress the development of this exciting new form of communications. This would be bad public policy, and bad for consumers.

Q. **(ISSUE 7): SHOULD E.SPIRE'S LOCAL SWITCHES BE CLASSIFIED AS BOTH A TANDEM AND END OFFICE SWITCH FOR PURPOSES OF BILLING RECIPROCAL COMPENSATION?**

A. Yes. e.spire's position is that it is entitled to compensation at BellSouth's tandem interconnection rate if e.spire's switches serve geographic areas comparable to the area served by BellSouth's tandems. This position is fully supported by Section 51.711(a)(3) of the FCC's rules, which states that the ILEC's tandem interconnection rate is the appropriate rate to employ where a CLEC's switch "serves a geographic area comparable to the area served by the incumbent LEC's tandem switch." e.spire's switches function both as a tandem switch and as an end office switch, and, based on the FCC's rules, is legally entitled to be compensated as both. Accordingly, the Commission should confirm that, in South Carolina, the tandem interconnection rate is the sum of the end office switching, tandem switching and transport rates.

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. My understanding is that BellSouth considers that, if (due to differences in the way the parties' networks are configured) e.spire's switches are not actually utilized in precisely the same manner as BellSouth's tandems, e.spire should not be compensated for their use at the tandem rate. BellSouth would leave the tandem rate compensation out of the total compensation paid to e.spire for the use of its switches, and employ only the end office rate.

Q. SHOULD THE TANDEM RATE BE PAID IN ADDITION TO THE END OFFICE RATE EVEN IF E.SPIRE'S SWITCHES AREN'T USED IN PRECISELY THE SAME MANNER THAT BELLSOUTH'S TANDEMS ARE USED?

A. Yes. The simple answer is that the FCC mandates this treatment in its rules – and the U.S. Supreme Court's January 25, 1999 decision in *AT&T Corp. v. Iowa Utilities Board* upheld the FCC's pricing rules, including the rule applicable here. According to the FCC's very clearly stated rule, the question is not whether the switch is used in the precise same manner that an ILEC uses its tandem switches, but rather whether a CLEC switch serves an area comparable in geographic scope to BellSouth's tandem.

We have prepared a confidential diagram to serve as **"Exhibit 2"** hereto which demonstrates how e.spire's switches in Greenville and Columbia, SC provide geographic coverage and functionality comparable to that offered by BellSouth's tandem and end office switches in combination. This document will be filed separately pursuant to a confidentiality agreement between the Parties. e.spire's switches perform the same essential function as BellSouth's tandem switches, that of aggregating traffic from widespread, remote locations. e.spire employs very sophisticated and capable switches to combine the tandem and end office switch functions, thereby performing the same duties as the two separate classes of switches that BellSouth employs in its more antiquated network design: e.spire should certainly not be penalized for its more efficient network design, and as the FCC has already decided, should be compensated accordingly. BellSouth has not even attempted to argue that the area serviced by e.spire's switches is not geographically comparable. Essentially, BellSouth is just focusing on a legally immaterial distinction between its tandem switches and e.spire's more capable Lucent 5ESS switch, and asking this Commission to ignore the valid and applicable FCC rule.

Q. HAS ANY STATE COMMISSION DETERMINED THAT A CLEC EMPLOYING LUCENT 5ESS SWITCHES IS ENTITLED TO TANDEM COMPENSATION PURSUANT TO FCC RULE 51.711(a)(3)?

A. Yes. In fact, the North Carolina Utilities just recently (March 1, 2000) found that a competitive carrier, ICG Telecom Group, Inc. ("ICG") is entitled to tandem compensation for its Charlotte, NC switch under the FCC's rules. Importantly, ICG uses the same type of switch, a Lucent 5ESS, that e.spire uses in South Carolina. The North Carolina Commission's decision is attached to my testimony as **"Exhibit 3".**

Q. WHY IS THE TYPE OF SWITCH IMPORTANT?

A. Under the FCC's Rule 51.711(a)(3), the type of switch really isn't important. The rule focuses instead on whether the CLEC switch covers a geographic area comparable in scope to that covered by the ILEC's tandem. In this case, as in the case of the ICG Charlotte, NC switch, the e.spire switches in Greenville and Columbia, South Carolina cover comparable geographic areas, satisfying the FCC rule requirements. But BellSouth has argued that the switch function is the determinative factor. In the North Carolina order I have attached, the Commission did not reach the question of whether only geographic scope, and not similar functionality, is required for tandem compensation, *because the Commission found that, in addition to covering a comparable geographic scope, ICG's Lucent 5ESS switch in fact performed the same or similar functions as BellSouth's tandem.* The Lucent switch is designed to be deployed as a Class 4/Class 5 switch: a total solution for competitive carriers. I have attached some information on Lucent's switch as **"Exhibit 4"** hereto, showing that it is a multipurpose switch capable of incorporating both local and network functions, including tandem functions.

Q. **(ISSUE 8): SHOULD BELLSOUTH BE REQUIRED TO LOWER RATES FOR MANUAL SUBMISSION OF ORDERS, OR, ALTERNATIVELY, ESTABLISH A REVISED "THRESHOLD BILLING PLAN" THAT (I) EXTENDS THE TIMEFRAME FOR MIGRATION TO ELECTRONIC ORDER SUBMISSION AND (II) DELETES SERVICES WHICH ARE NOT AVAILABLE THROUGH ELECTRONIC INTERFACES FROM THE CALCULATION OF THRESHOLD BILLING AMOUNTS?**

A. BellSouth's rates for manual submission of orders are unconscionably high, and will suppress the ability of new entrants to enter the local markets. A simple remedy would be for BellSouth to lower the rates dramatically. This is an especially troublesome situation, because in many cases there are no real alternatives to manual submission of orders, because BellSouth's electronic ordering system is either faulty or fails to include all the necessary categories of services. It is apparent that BellSouth recognizes the need to migrate its wholesale customers to some form of workable electronic ordering system – this will ultimately help to streamline the process, and reduce the human workforce requirements. The practical problem is that, as with any migration, there has to be somewhere to migrate *to*. The language BellSouth includes in its proposed agreement is essentially shooing the ducks away to a pond that doesn't exist.

To compel e.spire to migrate to an electronic order submission regime, BellSouth has proposed what it terms a "threshold billing plan" – a temporary measure that offers a lower manual order submission charge in return for a commitment on e.spire's part to submit a steadily increasing percentage of its orders as "mechanized" or electronic orders. . First, e.spire agrees with the intent of this plan, to encourage migration to electronic processes, and e.spire is rapidly transitioning to such processes, *where they exist.* The principal problems with this approach are that (i) the transition interval is too short, requiring e.spire to move to electronic submission before either e.spire or the electronic system is ready; and (ii) BellSouth's method of counting orders to establish the percentages it employs to make its calculations for purposes of the "threshold billing plan" paradoxically includes types of orders that its electronic systems cannot presently accommodate (because they relate to services that are not presently available through electronic interfaces). This has the effect of skewing the result to the great disadvantage of e.spire: it essentially penalizes e.spire for failing to submit electronically those orders that BellSouth's electronic ordering system is not ready to accept. This is an even bigger problem for e.spire than it might be for other carriers, because e.spire finds that a significant percentage of its total orders fall into this category. Moreover, part of the reason e.spire has not moved more rapidly to electronic ordering is because BellSouth was initially slow to develop them, and when it did, it kept switching systems. First, it was LENS, but that was only good for preordering and not ordering; then EDI-PC, but BellSouth could not maintain that system and did not even work with the vendor to make it Y2K compatible; now TAG is available and e.spire is just beginning to migrate to TAG.

Q. **WHAT IS BELLSOUTH'S REACTION TO E.SPIRE'S POSITION?**

A. BellSouth takes the position that it is offering e.spire an incentive to submit more orders electronically, and if e.spire doesn't want to accept this incentive, e.spire can simply continue to pay the non-discounted manual order submission rate.

Q. **IS BELLSOUTH'S POSITION REASONABLE IN THE CIRCUMSTANCES?**

A. No. BellSouth knows that its manual order submission rates are too high, and will have to come down. In fact, given the DS-O loop charges and associated ordering charges, many CLECs such as e.spire have abandoned competition for customers with a small number of access lines. Thus, high loop charges and high ordering charges have come with a severe cost to competition. But instead of lowering its rates, BellSouth has proposed a complicated program to transition e.spire to electronic ordering. As a general concept, this is not unacceptable. However, BellSouth has designed its incentive program to make it essentially impossible for e.spire to comply. So the so-called "threshold billing plan" is more of a diversion than a real remedy, making it look as if BellSouth is addressing this problem while in reality it is not.

Q. WHAT DOES E.SPIRE PROPOSE AS A SOLUTION?

A. It's in everyone's interest to have a workable electronic ordering system that will lessen the need for human intervention. The problem is that that system does not presently exist, and for the time being some orders will have to be submitted manually. e.spire does not oppose being transitioned to electronic ordering – in fact, this would be welcome. But any transitioning plan needs to take into account the facts as they exist – and it needs to be neutrally structured so that it does not mandate failure from the beginning. In e.spire's view, pending the development of a truly workable electronic system, BellSouth has two reasonable paths before it: either (i) it can lower the manual order submission charges to something more realistic and consistent with industry practice, or (ii) it can propose a method of migration that takes into account the facts as they exist today, and does not preordain failure. To do this BellSouth would have to lengthen the interval for transition to something realistic, and would have to exclude from the order pool those orders that cannot be entered electronically at present.

Q. **DOES E.SPIRE HAVE ANY SPECIFIC CHANGES TO PROPOSE TO THE THRESHOLD BILLING PLAN THAT WOULD ACHIEVE THE DESIRED OBJECTIVE?**

A. Yes. e.spire proposes that the threshold billing plan be revised both to extend the overall timetable for migration to electronic ordering and to exclude from the base of orders used to calculate the percentage of migration those orders that presently cannot be entered electronically. e.spire proposes that the mechanized rate for service requests be applied to all orders if e.spire meets the following threshold percentages:

Year	Ratio of Mechanized Orders/Total Orders
1999	70%
2000	80%
2001	90%

In this instance, the "Total Orders": would exclude those orders for which mechanized submission is not presently possible because the services associated with that order are not available through electronic interfaces.

Q. **ARE THERE ANY OTHER NECESSARY CHANGES THAT E.SPIRE WOULD LIKE TO SEE?**

A. Yes. In light of the problem I mentioned earlier with the constantly-changing electronic systems, e.spire recommends that the Commission order BellSouth to keep TAG available for at least five years. This will provide some degree of certainty for CLECs using electronic ordering.

Q. (ISSUE 9): SHOULD BELLSOUTH BE REQUIRED TO PROVIDE REASONABLE AND NONDISCRIMINATORY ACCESS TO UNBUNDLED NETWORK ELEMENTS ("UNES") IN ACCORDANCE WITH ALL *EFFECTIVE* RULES AND DECISIONS OF THE FCC AND THIS COMMISSION?

[Note: the foregoing issue was closed during follow-up negotiations between e.spire and BellSouth; therefore, no testimony is being offered on this issue.]

Q. (ISSUE 10): SHOULD BELLSOUTH BE REQUIRED TO PROVIDE E.SPIRE WITH ACCESS TO EXISTING COMBINATIONS OF UNES IN BELLSOUTH'S NETWORK AT UNE RATES?

[Note: the foregoing issue was closed during follow-up negotiations between e.spire and BellSouth; therefore, no testimony is being offered on this issue.]

Q. (ISSUE 11): SHOULD BELLSOUTH BE REQUIRED TO PROVIDE ACCESS TO ENHANCED EXTENDED LINKS ("EELS") AT UNE RATES WHERE THE LOOP AND TRANSPORT ELEMENTS ARE CURRENTLY COMBINED AND PURCHASED THROUGH BELLSOUTH'S SPECIAL ACCESS TARIFF?

[Note: the foregoing issue was closed during follow-up negotiations between e.spire and BellSouth; therefore, no testimony is being offered on this issue.]

Q. (ISSUE 12): IF BELLSOUTH PROVIDES ACCESS TO EELS AT UNE RATES WHERE THE LOOP AND TRANSPORT ELEMENTS ARE CURRENTLY COMBINED AND PURCHASED THROUGH BELLSOUTH'S SPECIAL ACCESS TARIFF, SHOULD E.SPIRE BE ENTITLED TO UTILIZE THE ACCESS SERVICE REQUEST ("ASR") PROCESS TO SUBMIT ORDERS?

A. e.spire believes that it should be able to purchase EELs (where BellSouth is required to make them available) using the most efficient means reasonably available. If a loop and transport combination is available for purchase, no onerous or time-consuming process should be associated with obtaining it. In this instance, there is a procedure – the ASR procedure -- available for purchasing the loop and transport combination through the special access tariff, but as of yet there is no comparably efficient means to purchase the EELs as a UNE. Absent a special ordering process for EEL UNEs that is equally efficient or more efficient, e.spire and other competitive carriers should be able to use the ASR procedure to purchase EELs.

Q. (ISSUE 13): IF E.SPIRE SUBMITS ORDERS FOR EELS, SHOULD BELLSOUTH BE REQUIRED TO MAKE THE RESULTANT BILLING CONVERSION WITHIN 10 DAYS?

A. e.spire believes that it would be helpful to set a reasonable limit on the time in which BellSouth makes the billing conversion associated with the purchase of EELs, to avoid unnecessary delays and interposition of essentially purposeless processing steps that increase the time and expense to access EELs. In e.spire's opinion, 10 calendar days should be ample time for BellSouth to make the required billing conversion, and any processing delays past that point are unnecessary and are likely imposed for anticompetitive purposes.

Q. (ISSUE 14): SHOULD BELLSOUTH BE PROHIBITED FROM IMPOSING NON-RECURRING CHARGES OTHER THAN A NOMINAL SERVICE ORDER FEE FOR EEL BILLING CONVERSIONS?

A. There is no particular magic in the loop and transport combination that constitutes an EEL. These are simply two network elements that happen to be already combined in BellSouth's network that must be sold as a unit in the specified circumstances. There should be no extraordinary charges associated with furnishing this combination. Of course, BellSouth may want to hinder CLEC access to EELs in general by imposing additional charges, but this should not be allowed. It is not necessary to "glue" these components together, since they are already combined, and there is no dramatic transaction that has to take place to make the EEL available to e.spire. Where there are reasonable expenses incurred, for example, for the billing conversation transaction, e.spire thinks they should be recognized. But the temptation to impose extra, fanciful charges to impede CLEC access is certainly there and, while hopeful that BellSouth will not take advantage of this opportunity, e.spire thinks it is reasonable to include language in the Parties' interconnection agreement that prohibits the imposition of any non-recurring charges for furnishing the EEL. Apart from the nominal, cost-based charge that may be associated with the billing conversion, the EEL should be made available in the same manner as any other UNE.

Q. (ISSUE 15): SHOULD THE PARTIES UTILIZE THE FCC'S MOST RECENT DEFINITION OF "LOCAL LOOP" INCLUDED IN THE *UNE REMAND ORDER*?

[Note: the foregoing issue was closed during follow-up negotiations between e.spire and BellSouth; therefore, no testimony is being offered on this issue.]

Q. (ISSUE 16): SHOULD BELLSOUTH BE REQUIRED TO CONDITION LOOPS AS NECESSARY TO PROVIDE ADVANCED SERVICES IN ACCORDANCE WITH THE FCC'S *UNE REMAND ORDER*?

[Note: the foregoing issue was closed during follow-up negotiations between e.spire and BellSouth; therefore, no testimony is being offered on this issue.]

Q. (ISSUE 17): SHOULD THE PARTIES UTILIZE THE FCC'S MOST RECENT DEFINITION OF NETWORK INTERFACE DEVICE ("NID") INCLUDED IN THE *UNE REMAND ORDER*?

[Note: the foregoing issue was closed during follow-up negotiations between e.spire and BellSouth; therefore, no testimony is being offered on this issue.]

Q. (ISSUE 18): SHOULD BELLSOUTH BE REQUIRED TO OFFER SUBLOOP UNBUNDLING IN ACCORDANCE WITH THE FCC'S *UNE REMAND ORDER*?

[Note: the foregoing issue was closed during follow-up negotiations between e.spire and BellSouth; therefore, no testimony is being offered on this issue.]

Q. (ISSUE 19): SHOULD BELLSOUTH BE REQUIRED TO PROVIDE ACCESS TO LOCAL CIRCUIT SWITCHING, LOCAL TANDEM SWITCHING AND PACKET SWITCHING CAPABILITIES ON AN UNBUNDLED BASIS IN ACCORDANCE WITH THE FCC'S *UNE REMAND ORDER*?

[Note: the foregoing issue was closed during follow-up negotiations between e.spire and BellSouth; therefore, no testimony is being offered on this issue.]

Q. (ISSUE 20): **SHOULD THE PARTIES UTILIZE THE DEFINITIONS OF LOCAL CIRCUIT SWITCHING, LOCAL TANDEM SWITCHING AND PACKET SWITCHING INCLUDED IN THE FCC'S *UNE REMAND ORDER*?**

[Note: the foregoing issue was closed during follow-up negotiations between e.spire and BellSouth; therefore, no testimony is being offered on this issue.]

Q. (ISSUE 21): **SHOULD BELLSOUTH BE REQUIRED TO PROVIDE NONDISCRIMINATORY ACCESS TO INTEROFFICE TRANSPORT/ TRANSMISSION FACILITIES IN ACCORDANCE WITH THE TERMS OF THE FCC'S *UNE REMAND ORDER*?**

[Note: the foregoing issue was closed during follow-up negotiations between e.spire and BellSouth; therefore, no testimony is being offered on this issue.]

Q. (ISSUE 22): SHOULD THE PARTIES UTILIZE A DEFINITION OF INTEROFFICE TRANSPORT CONSISTENT WITH THE USAGE IN THE FCC'S *UNE REMAND ORDER*, THAT INCLUDES DARK FIBER, DS1, DS3, OCN LEVELS AND SHARED TRANSPORT?

[Note: the foregoing issue was closed during follow-up negotiations between e.spire and BellSouth; therefore, no testimony is being offered on this issue.]

Q. (ISSUE 23): SHOULD BELLSOUTH PROVIDE NONDISCRIMINATORY ACCESS TO OPERATIONS SUPPORT SYSTEMS ("OSS") AND SHOULD THE PARTIES UTILIZE A DEFINITION OF OSS CONSISTENT WITH THE FCC'S *UNE REMAND ORDER*?

[Note: the foregoing issue was closed during follow-up negotiations between e.spire and BellSouth; therefore, no testimony is being offered on this issue.]

Q. (ISSUE 24): SHOULD BELLSOUTH BE REQUIRED TO INCLUDE SPECIFIC INSTALLATION INTERVALS IN THE AGREEMENT FOR EELS AND EACH TYPE OF INTEROFFICE TRANSPORT?

A. e.spire considers that, in view of the complexity of the Parties' multifaceted relationship, more specificity is better than less. In this case, in view of the very crucial nature of timely access to interoffice transport to e.spire's business plan, e.spire considers it quite reasonable for BellSouth to commit to specific timeframes for installation of EELs, and for each type of interoffice transport. This will provide the needed clarity, and coupled with performance measures and liquidated damages provisions, will help to ensure BellSouth's performance in delivering timely access to these crucial elements of its network.

Q. (<u>ISSUE 25</u>): SHOULD BELLSOUTH BE COMPELLED TO ESTABLISH GEOGRAPHICALLY-DEAVERAGED RATES FOR NRCS AND RECURRING CHARGES FOR ALL UNES?

[Note: the foregoing issue was closed during follow-up negotiations between e.spire and BellSouth; therefore, no testimony is being offered on this issue.]

Q. (<u>ISSUE 26</u>): SHOULD BELLSOUTH BE REQUIRED TO ESTABLISH TELRIC-BASED RATES FOR THE UNES, INCLUDING THE NEW UNES, REQUIRED BY THE *UNE REMAND ORDER*?

A. e.spire believes that the Commission should require BellSouth to produce, on an expedited basis, the necessary TELRIC cost studies to support pricing for the new UNEs in the FCC's *UNE Remand Order*.

Q. (ISSUE 27): SHOULD BOTH PARTIES BE ALLOWED TO ESTABLISH THEIR OWN LOCAL CALLING AREAS AND ASSIGN NUMBERS FOR LOCAL USE ANYWHERE WITHIN SUCH AREAS, CONSISTENT WITH APPLICABLE LAW?

A. e.spire considers that both parties should be able to establish their own local calling areas and assign numbers for use anywhere within such areas, so long as doing so is consistent with applicable law. The ability to design local calling areas is an important part of a competitive carrier's business plan. After all, one of the principal points of introducing competition is to foster change and innovation, giving customers a different "menu" of options that may strike their fancy. Some customers may be attracted to a competitive carrier's arrangement because those customer may benefit financially from the alternate design of a local calling area. Some calls that were formerly toll calls under BellSouth's arrangement may be local in character under a competitive carrier's alternate plan, and this may be attractive to certain customers. The ability to study the market and the customer base, and make a determination as to how to design a competitive network, and how to charge for services rendered on it are central to a competitive carrier's ability to attract new customers.

e.spire has introduced expanded local calling areas already. For example, e.spire's expanded local calling area in the Washington, D.C. metro area has proven to be extremely popular with consumers. The Commission should ensure that BellSouth is not permitted through its interconnection agreements to stifle the availability of the new alternatives that local competition was designed to engender.

e.spire is concerned that BellSouth is seeking to impose restrictions on how e.spire may interconnect with BellSouth, and that such restrictions will prevent e.spire from configuring and deploying its network in an efficient manner. BellSouth is attempting to compel e.spire to interconnect at multiple access and local tandems, and to define its local calling area served by its NPA/NXX codes to the same local service area defined by BellSouth, and to place limits on the types of traffic e.spire may carry over these collocated facilities. These restrictions are in clear violation of Section 251(c)(2)(B) of the Communications Act, which requires BellSouth to provide interconnection with e.spire "at any technically feasible point within the carrier's network." Moreover, BellSouth's attempt to force e.spire to align its NPA/NXXs to the same local service areas defined by BellSouth would prevent e.spire from offering its customers larger local calling areas, and would force e.spire to charge toll rates in areas where it otherwise would choose not to do so.

e.spire's proposal would allow BellSouth to identify what type of traffic e.spire is sending to BellSouth, and fully recognizes e.spire's obligation to pay BellSouth when different types of traffic (local, access, or transit) are delivered to BellSouth. Accordingly, there is no reason for BellSouth to oppose e.spire's proposal other than to require all CLECs to conform to the staid products and marketing plans of BellSouth.

Q. (<u>ISSUE 28</u>): IN THE EVENT THAT E.SPIRE CHOOSES MULTIPLE TANDEM ACCESS ("MTA"), MUST E.SPIRE ESTABLISH POINTS OF INTERCONNECTION AT ALL BELLSOUTH ACCESS TANDEMS WHERE E.SPIRE'S NXX'S ARE "HOMED"?

A. Any requirement that e.spire establish a POI at every tandem where its NXXs are homed would effectively eliminate the usefulness of MTA altogether. This is an attempt by BellSouth to force e.spire to configure its network to look like BellSouth's network, for the convenience of BellSouth. In order to provide the maximum in service choices to customers, at the most competitive prices available, e.spire must have the freedom to configure its network and to assign NXXs in the most efficient manner possible, and to define local calling areas as it chooses.

Q. (ISSUE 29): SHOULD LANGUAGE CONCERNING LOCAL TANDEM INTERCONNECTION BE SIMPLIFIED TO EXCLUDE, AMONG OTHER THINGS, THE REQUIREMENT TO DESIGNATE A "HOME" LOCAL TANDEM FOR EACH ASSIGNED NPA/NXX AND THE REQUIREMENT TO ESTABLISH POINTS OF INTERCONNECTION TO BELLSOUTH ACCESS TANDEMS WITHIN THE LATA ON WHICH E.SPIRE HAS NPA/NXXS "HOMED"?

A. e.spire seeks simple and straightforward language that guarantees that e.spire can interconnect where it is efficient to do so, and without restricting the types of traffic e.spire can carry over the interconnected facilities. e.spire must be able to interconnect with BellSouth's network "at any technically feasible point" for the "transmission and routing of telephone exchange service and exchange access," as required by the federal Communications Act. Any restrictions that would force e.spire to define its local service area the same way that BellSouth defines its local exchange, and any limitation that would prohibit e.spire's ability to interconnect in the BellSouth office of its choice, would be a disservice to the public interest, and would violate the Communications Act. BellSouth's proposal is unnecessarily complicated in a way that would be detrimental to competitors, and to consumers.

Q. (ISSUE 30): SHOULD CPNI/PLU/PIU BE THE EXCLUSIVE MEANS USED TO IDENTIFY THE JURISDICTIONAL NATURE OF TRAFFIC UNDER THE AGREEMENT?

A. e.spire thinks that the jurisdictional nature of traffic can be determined adequately by CPNI/PLU/PIU, and no additional measures are required. BellSouth has proposed that e.spire assign its numbers so that it is immediately apparent to BellSouth whether a call to or from the number is local or toll in nature. e.spire, however, cannot honor BellSouth's request in this case, because to do so essentially interferes with e.spire's ability to design its own local calling areas and assign numbers to them as it sees fit. As pointed out earlier in my testimony, this ability is essential to e.spire's ability to differentiate itself from BellSouth, to innovate, and compete in a robust fashion. Although e.spire is pleased to accommodate BellSouth in many ways, a line must be drawn when BellSouth insists on asserting control over e.spire's network design and/or the manner in which it offers service and markets its products. The Parties can make use of tried-and-true business practices such as the exchange of CPNI information where available, a process that Bell Atlantic proposed to e.spire and which has been working fine with Bell Atlantic for several years. With Bell Atlantic, periodic PLU/PIU reports must be provided, but only where CPNI is not available, to determine the jurisdictional nature of calls. It is not necessary for BellSouth to dictate e.spire's network design or calling patterns for BellSouth to make determinations as to call jurisdiction. BellSouth will concur that e.spire has consistently identified traffic to BellSouth under its current obligations and has not attempted to skirt its obligations in this regard.

Q. (ISSUE 31): SHOULD ALL REFERENCES TO BELLSOUTH'S STANDARD PERCENT LOCAL USE REPORTING PLATFORM BE DELETED?

[Note: the foregoing issue was closed during follow-up negotiations between e.spire and BellSouth; therefore, no testimony is being offered on this issue.]

Q. (ISSUE 32): SHOULD SPECIFIC LANGUAGE BE INCLUDED PRECLUDING IXCS FROM USING "TRANSIT" ARRANGEMENTS TO ROUTE TRAFFIC TO E.SPIRE?

[Note: the foregoing issue was closed during follow-up negotiations between e.spire and BellSouth; therefore, no testimony is being offered on this issue.]

Q. (ISSUE 33): HOW SHOULD THE PARTIES COMPENSATE EACH OTHER FOR INTERCONNECTION OF THEIR RESPECTIVE FRAME RELAY NETWORKS?

A. The transport facilities connecting the Parties' frame relay networks are indistinguishable from unbundled transport facilities, and they should be priced based on TELRIC. Similarly, the other elements of frame relay interconnection, the Network to Network Interface ("NNI") and the Data Link Connection Identifiers ("DLCIs") should also be priced at TELRIC. There is no support in applicable law for pricing these elements at the higher, non-cost-based rates set forth in BellSouth's tariffs.

Q. **(ISSUE 34): SHOULD BELLSOUTH'S RATES FOR FRAME RELAY INTERCONNECTION BE ESTABLISHED AT TELRIC?**

A. The rates and charges for interconnection and compensation for local traffic must reflect incremental cost, as mandated by Sections 251(c)(2) and 252(d)(1) of the Communications Act and the FCC's rules. The FCC has defined the incremental costing methodology that must be used as Total Long Run Incremental Cost ("TELRIC"). While the FCC's existing TELRIC rules are subject to appeal before the 8th Circuit Court of Appeals, the Supreme Court recently confirmed that the FCC has the discretion to establish the costing rules that must apply to interconnection and reciprocal compensation. BellSouth has not shown that its tariffed frame relay rates are based on long run incremental cost, and I believe that it is unlikely that they are. As such, it is inappropriate to use BellSouth's tariffed rates for the frame relay interconnection arrangement under discussion. e.spire suggests that one-half of BellSouth's tariffed frame relay rates should apply as an interim rate, until such time as the Commission may complete a rate inquiry and determine the appropriate incremental cost-based rates. Setting interim rates at 50% of BellSouth's tariffed frame relay rates is reasonable because that is typically the difference between BellSouth's UNE rates (which are based on incremental costs) and the tariffed rates for services that provide the equivalent functionality. e.spire would not object to having the interim rates subject to true-up at the time final rates are established.

Q. WHAT ARE E.SPIRE'S DETAILED PROPOSALS REGARDING COMPENSATION FOR USE OF THE PARTIES' FRAME RELAY NETWORKS?

A. With respect to the transport circuit between the Parties' respective frame relay switches, e.spire proposes that it pay to BellSouth the total non-recurring and recurring TELRIC cost-based charges, and then recoup from BellSouth an amount calculated by multiplying BellSouth's billed charges for the circuit by one-half of e.spire's percent local circuit use ("PLCU") calculation. For each pair of network-to-network interface ("NNI") ports (one on BellSouth's network and a corresponding one on e.spire's network), e.spire proposes that it pay the total non-recurring and recurring TELRIC cost-based charges for BellSouth's NNI port, and then recoup from BellSouth an amount calculated by multiplying the BellSouth billed charges by 100% of e.spire's PLCU.

Where no PVCs are set up on an interconnection facility, the costs should be borne equally, so the PLCU should be deemed equal to 100%.

Q. WHAT ABOUT COMPENSATION FOR PERMANENT VIRTUAL CIRCUITS ("PVCs") AND PVC RATE ELEMENTS?

A. As a general matter, e.spire proposes that any compensation for interconnection between the e.spire and BellSouth frame relay switches be based on TELRIC costs, as described above. e.spire proposes that there be no additional charges as PVCs are loaded onto the interconnection facilities, except for DLCIs as described below. In the case of a local PVC, each party will establish the segment of the PVC from its own frame relay switch to the customer's premises, and no compensation will be exchanged between the Parties for that transaction. The Parties will absorb their DLCI costs for the local PVCs. Then e.spire will pay BellSouth the total cost-based non-recurring charges for establishing a Data Link Control Identifier ("DLCI"), and recoup from BellSouth one-half of the non-recurring DLCI charges associated with that segment.

Q. HOW DOES E.SPIRE PROPOSE TO SET COMPENSATION FOR INTERLATA PVCs?

A. As to interLATA PVCs ordered by e.spire, e.spire will pay BellSouth the total. cost-based non-recurring charges for establishing the DLCI at BellSouth's NNI and will not charge for the DLCI at its own NNI.

Q. **<u>(ISSUE 35)</u>: SHOULD BELLSOUTH BE REQUIRED TO ESTABLISH PRESCRIBED INTERVALS FOR INSTALLATION OF INTERCONNECTION TRUNKS?**

A. BellSouth is providing services and network elements to e.spire and other companies that directly compete with BellSouth's products, and for BellSouth's customers. In such circumstances, it is understandable that BellSouth would be less than enthusiastic about providing high quality and prompt service to e.spire, especially in facilitating e.spire's access to BellSouth's network. In such circumstances, e.spire believes that the only way to ensure adequate performance is to have a clear target for completion, and adverse consequences that attach to substandard performance. Accordingly, BellSouth should establish prescribed intervals for installation of interconnection trunks, and should observe those intervals , or be compelled to pay damages for failure to perform.

Q. **<u>(ISSUE 36)</u>: SHOULD THE CHARGES AND THE TERMS AND CONDITIONS SET FORTH IN E.SPIRE'S TARIFF GOVERN THE ESTABLISHMENT OF INTERCONNECTING TRUNK GROUPS BETWEEN BELLSOUTH AND E.SPIRE?**

A. Yes. e.spire's tariffed charges and terms and conditions for interconnection trunks are based on e.spire's business plan, and are priced based on competitive conditions in the market. It does not make sense to mirror BellSouth's tariffed rate for interconnection trunks, or to mirror the rates for unbundled transport, since BellSouth's rates are based on BellSouth's costs, which have no analogue in e.spire's situation. Unbundled transport pricing should only be available to BellSouth under very limited circumstances, if at all. BellSouth proposes that unbundled transport pricing should be available to BellSouth automatically, which is inconsistent with industry practice nationwide.

Q. **(ISSUE 37): FOR TWO-WAY TRUNKING, SHOULD THE PARTIES BE COMPENSATED ON A PRO RATA BASIS?**

A. Yes. BellSouth proposes that two-way trunks be paid for 50/50 by the Parties. Of course, that would only be the appropriate breakout if the Parties were sending equal amounts of traffic to each other over the two-way trunks. (Generally, each party pays the interconnection trunking costs to deliver its traffic from its network to the other party's switch.) Experience has shown that BellSouth sends much more traffic to e.spire than vice-versa, and BellSouth should therefore pay its pro rata share based on the amount of traffic on the trunks. Southwestern Bell Telephone has actually attempted to shirk its trunking costs by insisting on two-way trunks, and then demanding that the costs be split 50/50. e.spire cannot reasonably be required to pay the costs of its vastly larger competitors.

Q. (ISSUE 38): SHOULD E.SPIRE BE PERMITTED THE OPTION OF RUNNING COPPER ENTRANCE FACILITIES TO ITS BELLSOUTH COLLOCATION SPACE IN ADDITION TO FIBER?

A. Yes. e.spire sees no reason why it cannot choose the media over which it transmits signals from its interconnection points in collocated space at BellSouth's offices to e.spire's switch. Although it is customary to employ glass fiber due to its superior carriage capacity, it should be up to e.spire if it wishes to employ copper entrance facilities in lieu of, or in addition to, fiber facilities. The Parties' agreement should allow for technological innovation and choice where feasible, rather than limiting e.spire's choices or forcing them to mirror BellSouth's own preferred practices.

Q. (ISSUE 39): SHOULD E.SPIRE BE REQUIRED TO PAY A SUBSEQUENT APPLICATION FEE TO BELLSOUTH FOR INSTALLATION OF CO-CARRIER CROSS CONNECTS EVEN WHEN E.SPIRE PAYS A CERTIFIED VENDOR TO ACTUALLY PERFORM THE WORK?

A. No. e.spire objects to "double-dipping" by BellSouth in its various fees, and does not believe that it is appropriate for BellSouth to impose fees that have no apparent relationship to costs, or to the nature of the transaction involved. If e.spire retains a certified vendor to perform the cross-connect, that should be the end of the story. e.spire should not incur duplicative fees above and beyond the cost of actually doing the work.

Q. **(ISSUE 40): SHOULD BELLSOUTH BE REQUIRED TO RESPOND TO ALL E.SPIRE APPLICATIONS FOR PHYSICAL COLLOCATION SPACE WITHIN 45 CALENDAR DAYS OF SUBMISSION?**

A. e.spire believes that BellSouth should be able to provide comprehensive written responses to all e.spire applications for physical collocation space well within 45 calendar days. In keeping with the Commission's March 31 *Advanced Services Order*, BellSouth should respond to e.spire's initial request within 10 calendar days, noting whether suitable space does or does not exist. For the first 15 orders, the response time should be 30 calendar days. For 16 orders and above, 45 calendar days should be sufficient for BellSouth to finalize a detailed response.

Q. **(ISSUE 41): WHEN BELLSOUTH RESPONDS TO AN E.SPIRE APPLICATION FOR PHYSICAL COLLOCATION BY OFFERING TO PROVIDE LESS SPACE THAN REQUESTED, OR SPACE CONFIGURED DIFFERENTLY THAN REQUESTED, SHOULD SUCH A RESPONSE BE TREATED AS A DENIAL OF THE APPLICATION SUFFICIENT TO ENTITLE E.SPIRE TO CONDUCT A CENTRAL OFFICE TOUR?**

A. e.spire believes that any response to an application for collocation that offers a situation materially different than the one applied for is an effective denial of the proposal contained in the application. In the case of a response from BellSouth that offers less space than requested, or space configured differently than expected, verification is appropriate. A central office tour will provide both parties with the information necessary to find a solution to the problem, one way or another. However, compelling e.spire to simply proceed "on faith" that there is no other way to implement the CLEC's collocation space than the offer made by BellSouth puts e.spire at a material disadvantage. BellSouth could undercut e.spire's efforts by repetitive, slight mismatches between e.spire's requested situation and the one offered, causing all manner of difficulties. This problem could be avoided at the outset if BellSouth would afford a CLEC representative the right to verify that no other suitable space exists.

Q. **(ISSUE 42): SHOULD THE PRESCRIBED INTERVALS FOR RESPONSE TO COLLOCATION REQUESTS BE SHORTENED FROM THE BELLSOUTH STANDARD PROPOSAL?**

A. Yes, they should. e.spire considers this to be a very important issue. Not only are BellSouth's proposed response intervals too long, but they are stated in *business days* instead of calendar days. Use of business days has the somewhat deceptive effect of making an interval look shorter than it really is, similar to marketing conventions that price items at $1.99 to make them appear to be less than two dollars. Measuring critical provisioning intervals in "business days" unreasonably extends BellSouth's response time for every step of the collocation process. It also results in clear violation of the FCC's collocation rules and policies.

For example, in Attachment 4, Sections 2.1 and 6.2 of its proposed draft agreement, BellSouth proposes a 10 *business day* turnaround for initial collocation applications, after which BellSouth will respond, telling e.spire whether space is or is not available, and whether the application is bona fide. This means that if e.spire makes application on Friday the 1st, (assuming "day 1" is the following business day) BellSouth will not be required to respond until Friday the 15th. And if a holiday intervenes on a day that would otherwise be a "business day," BellSouth might not be required to reply until Monday the 18th. So, instead of "10 days," BellSouth is really taking *two weeks or more* to process a very simple request. This is not a reasonable interval, and it is inconsistent with the FCC's rules. This is why the interconnection agreement must be clarified to refer to "calendar days" in setting collocation and other intervals.

In Section 6.3.1 of the Parties' agreement, BellSouth proposes to give itself 5 business days, essentially one calendar week or more, simply to *acknowledge the receipt of* e.spire's bona fide firm order. Why does this simple transaction require a week?

The situation becomes even more extreme in Section 6.2 of the draft agreement when BellSouth proposes to allow itself 30 business days, 36 business days, and 42 business days, respectively, for providing comprehensive written responses to completed applications for collocation, depending on how many applications are received in a certain time frame. Thirty business days is not a calendar month; it is really closer to *six weeks*, depending on holidays, etc. These intervals are not reasonable or efficient, when it is considered that e.spire has a business plan to execute, and customers to serve. If BellSouth really requires this amount of time to respond to collocation applications, this would seem to indicate that BellSouth is understaffed and should devote more resources to this crucial process. If CLECs cannot collocate efficiently and relatively quickly, it is a severe detriment to the growth of competition in this state – and every link in the chain, every delay in the sequential provision of collocation, counts. For this reason, the Commission should prefer e.spire's language, substituting calendar days for business days.

Q. (ISSUE 43): SHOULD BELLSOUTH BE PERMITTED TO EXTEND ITS COLLOCATION INTERVALS SIMPLY BECAUSE E.SPIRE CHANGES ITS APPLICATION REQUEST?

A. No, I don't believe this is appropriate. The collocation intervals proposed by BellSouth are more than generous; in fact, as I note below, e.spire is asking the Commission to require BellSouth to shorten the intervals, and to use calendar days instead of business days. In normal circumstances, the types of changes made by e.spire to a BellSouth proposal would be very marginal, indeed, meant to optimize e.spire's use of space according to its particular needs. Such modifications are scarcely a sea-change for BellSouth's collocation project management that would require lengthening the interval.

Since e.spire thinks the proposed interval for completion of collocation arrangements is already too long, it stands to reason that a few modest changes could be pumped into this situation without causing any scheduling problems. Of course, in the almost inconceivable circumstance that e.spire's changes were revolutionary, requiring some significant, time-consuming transaction that had not been anticipated, out of the scope of normal collocation situations, this would be a horse of a different color. The parties would have to discuss this together and come to some reasonable understanding about the delivery date. That's not what we're talking about here, however. In the normal, hum-drum collocation situation, BellSouth can simply absorb the trivial changes that e.spire is likely to make without changing the delivery schedule.

Q. (ISSUE 44): SHOULD THE PRESCRIBED INTERVALS FOR COMPLETION OF PHYSICAL COLLOCATION SPACE BE SHORTENED FROM THE BELLSOUTH STANDARD PROPOSAL?

A. Yes, as I have discussed, e.spire thinks all of BellSouth's intervals involving collocation are too long: first, because they employ *business* days instead of calendar days, stretching the intervals out and generally making everything more confusing. Second, because the intervals don't seem to bear any sensible relation to the transaction they are associated with. For example, BellSouth's proposed language makes no distinction between delivery of caged physical collocation arrangements and cageless arrangements. But from e.spire's point of view, there is a big difference in the amount of difficulty and the time and effort that needs to be spent. Obviously, if no cage has to be designed, placed and constructed, that's a time-saver right there. And if the CLEC installs its own bays and racks (using a certified vendor, of course), that should be taken into account.

Generally e.spire thinks there should be some sort of rational relationship between a given transaction and the amount of time BellSouth reserves to itself to get that transaction done – but we don't always see that in BellSouth's proposed language.

Q. WHAT INTERVALS DOES E.SPIRE PROPOSE FOR THE DELIVERY OF COLLOCATION ARRANGEMENTS?

A. e.spire has proposed the following intervals for delivery of collocation arrangements:

Caged collocation space:	90 calendar days
Cageless collocation space:	70 calendar days with BellSouth installation of bay/racks; 55 calendar days with CLEC installation of bay/racks.
CEVs, huts and vaults:	70 calendar days with BellSouth installation of bay/racks; 55 calendar days with CLEC installation of bay/racks.

e.spire thinks that these intervals should be reduced if BellSouth and e.spire meet sufficiently in advance of the submission of e.spire's applications to coordinate, plan and schedule the implementation of the arrangements, and has proposed language to this effect in the Parties' agreement.

Q. (ISSUE 45): SHOULD BELLSOUTH BE PERMITTED TO IMPOSE NON-RECURRING CHARGES ON E.SPIRE WHEN CONVERTING EXISTING VIRTUAL COLLOCATION ARRANGEMENTS TO CAGELESS PHYSICAL COLLOCATION?

A. No. From my point of view, this is entirely unreasonable. We need to step back a little from this question for me to explain my company's position. First, it must be kept in mind that virtual collocation is not normally a CLEC's first choice when it comes to interconnecting with an ILEC's network. Although there are some notable exceptions, most CLECs prefer to have physical collocation, managing and repairing their own equipment, rather than paying BellSouth to do it for them. In most but not all cases, a CLEC is virtually collocated because, at the time space for a physical collocation cage was requested, the ILEC responded that insufficient space was available to accommodate the CLEC's request. So in essence a CLEC "settles" for virtual collocation because there is no better option available in a given ILEC office. This is certainly true for e.spire.

And the reason there was no better option was that the ILECs were typically opposed to cageless collocation, and had requirements in their tariffs that required physical collocators to take more space than they really needed in most cases (e.g., the 100 square foot minimum for cages); and had numerous reasons why vacant space in their buildings could not be used for physical collocation (future growth plans, storage of unused, obsolete equipment, environmental unsuitability, etc.). Thus, the ILECs themselves attempted to minimize the space they made available for CLECs to collocate physically in their buildings, compelling CLECs to accept the less favorable virtual alternative.

The FCC's March 31, 1999 Advanced Services Order[1] made it clear, however, that (subject to some limitations) ILECs must make "any unused space" in their offices available for cageless collocation by CLECs. The FCC also prohibited any ILEC from "unreasonably segregating" CLEC equipment from its own. The advent of cageless collocation as a viable option, and the language of this FCC order essentially called a halt to the ILEC process that sought to compel would-be physical collocators to select virtual collocation instead.

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[1] *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* First Report and Order, CC Docket No. 98-147 (rel. March 31, 1999) ("Advanced Services Order").

Essentially there is no material technical difference between a virtual collocation arrangement and a cageless collocation arrangement adjacent to an ILEC's own equipment. The principal difference is that the ILEC maintains the CLEC equipment in the former case, and the CLEC maintains its own equipment in the latter case. So in most cases, to convert a virtual collocation arrangement to a cageless physical arrangement, it is not necessary to do much, except afford the CLEC's certified vendor access to the equipment.

If there is a need to relocate the CLEC's equipment away from its present position, the reason for it is generally that the ILEC wants it that way, e.g., for security reasons, or because the CLEC's equipment was in some way commingled with the ILEC's or because the ILEC plans some future growth of its own. Since the CLEC is perfectly happy where it is, and little or nothing needs to be done to convert a virtual arrangement to a cageless one, it is fundamentally unfair to charge the CLEC a large non-recurring charge for making the conversion.

This is especially true in light of the fact that e.spire is undoubtedly using virtual collocation for the sole reason that physical collocation was denied by BellSouth. In these circumstances, e.spire feels justified in proposing language in Attachment 4, section 6.9, requiring that BellSouth credit e.spire the non-recurring charges associated with the virtual collocation against any charges imposed for conversion of the arrangement to cageless collocation.

Q. (ISSUE 46): SHOULD BELLSOUTH BE PERMITTED TO PLACE RESTRICTIONS NOT REASONABLY RELATED TO SAFETY CONCERNS ON E.SPIRE'S CONVERSIONS FROM VIRTUAL TO CAGELESS PHYSICAL COLLOCATION ARRANGEMENTS?

A. No. The FCC's March 31, 1999 *Advanced Services Order* makes it clear that, subject to "technical feasibility" and "permissible security concerns" of the ILEC a cageless collocator may locate its equipment in "any unused space" in an incumbent LEC's central office, and that an ILEC may not "unreasonably segregate" the CLEC's equipment from its own. It's clear that having e.spire's equipment located where it is during virtual collocation is "technically feasible" because BellSouth put that equipment where it is, and has been operating it on e.spire's behalf. As to the "permissible security concerns," these can be addressed in a variety of ways. For one thing, it should be noted that the personnel e.spire retains to maintain its equipment are of necessity "certified vendors" of BellSouth – generally the same qualified same personnel that BellSouth would use for its own work. This by itself minimizes the security risk. Apart from that, there are any number of security techniques that BellSouth can use: access cards, closed circuit cameras, etc., that would allow BellSouth to leave e.spire's virtual equipment exactly where it is, and simply declare it "cageless." BellSouth can even cage its own equipment if it wants. Even "safety" concerns would seem to be dubious to the extent that the equipment is currently there today.

One thing that is clear, however, is that BellSouth does not have an entirely free hand with the types of restrictions it can place on e.spire or other CLEC cageless collocators. The Commission should not accept BellSouth language that is unduly restrictive, and should instead favor the language proposed by e.spire.

Q. (<u>ISSUE 47</u>): SHOULD BELLSOUTH PERMIT E.SPIRE TO VIEW THE RATES CHARGED AND FEATURES AVAILABLE TO END USERS IN THE CUSTOMER SERVICE RECORD ("CSR").

[Note: the foregoing issue was closed during follow-up negotiations between e.spire and BellSouth; therefore, no testimony is being offered on this issue.]

Q. (<u>ISSUE 48</u>): SHOULD BELLSOUTH BE REQUIRED TO PROVIDE FLOW THROUGH OF ELECTRONIC ORDERS AND PROCESSES AT PARITY?

[Note: the foregoing issue was closed during follow-up negotiations between e.spire and BellSouth; therefore, no testimony is being offered on this issue.]

Q. (ISSUE 49): SHOULD BELLSOUTH BE AUTHORIZED TO IMPOSE ORDER CANCELLATION CHARGES?

[Note: the foregoing issue was closed during follow-up negotiations between e.spire and BellSouth; therefore, no testimony is being offered on this issue.]

Q. (ISSUE 50): SHOULD BELLSOUTH BE REQUIRED TO PROVIDE READILY AVAILABLE RESULTS OF UNE PRE-TESTING TO E.SPIRE?

A. Yes. e.spire considers it reasonable that, if BellSouth has conducted pre-testing of UNEs or services ordered by e.spire *and* those test results are *readily available*, BellSouth should share them with e.spire. After all, e.spire is the customer, and the characteristics of the service or element purchased can very well be material. BellSouth should not make itself the sole arbiter of whether a UNE or a service is acceptable: there may be parameters in test results that e.spire, for its own idiosyncratic reasons, may find problematic. The best way to ensure efficiency is to share available information out front. I could understand BellSouth's reluctance to agree to this proposed language if it sought to compel BellSouth to produce some analysis that is not readily at hand, or to research something at great cost and expenditure of time. But in this case, we are only asking that BellSouth make available to its customer the test results of a product the customer is buying – if they are handy. This does not seem unduly burdensome, and has the potential of avoiding all sorts of wasteful wrangling about whether or not a service or a UNE is technically acceptable (and possibly time-consuming appeals for assistance to the Commission). BellSouth should commit to this in the Parties' agreement. .

Q. **(ISSUE 51): SHOULD BELLSOUTH BE PERMITTED TO IMPOSE ORDER EXPEDITE SURCHARGES WHEN IT REFUSES TO PAY A LATE INSTALLATION PENALTY FOR THE SAME UNES?**

A. e.spire thinks that, apart from the strict requirements of law, there is a role for basic fairness and good faith reciprocity in agreements between e.spire and ILECs such as BellSouth. The contracts should not be so one-sided as to favor one party's interests over another. This general principle is what e.spire has in mind when it suggests that BellSouth should not be able to impose a fee or surcharge on e.spire for expediting orders when BellSouth is not required to pay a late installation fee for the same UNEs. This is an unbalanced situation that should not be allowed to persist. If BellSouth is ready to commit to installing UNEs on schedule, pursuant to a reasonable metric, and subject to penalties for non-compliance, this would position BellSouth in a good equitable position to demand payment of a surcharge for expedited orders entered by e.spire. If BellSouth insists on installing UNEs with any schedule it pleases, not subject to any penalty or damages for non-compliance, it is fundamentally unfair to charge extra for expedited orders.

Q. **(ISSUE 52): SHOULD BELLSOUTH BE REQUIRED TO ADOPT INTERVALS OF 4 HOURS (ELECTRONIC ORDERS) AND 24 HOURS (MANUAL ORDERS) FOR THE RETURN OF FIRM ORDER COMMITMENTS ("FOCS")?**

A. One of the most basic elements of a CLEC's ability to compete is to order UNEs and services for its new and existing customers, and to have a reasonable and reliable time frame within which to implement service. The essential building block of this capability is ordering, and the turnaround time, and processing steps involved in ordering are absolutely crucial to CLECs such as e.spire. The first step in ordering is to submit a service order, either electronically or manually, and hope that it is accurate and includes all necessary details to go through the system without being "kicked back." If there are errors, the sooner we know about them, the simpler it is to correct them. If the order is acceptable, we need to know that, too, so that we can start the clock and keep our customers posted on the likely schedule for their service to be implemented. Accordingly, e.spire proposes that the firm order commitment or "FOC" (essentially the response from BellSouth that it has received a service order that is not defective on its face and can be processed further) should be turned around very quickly. The electronic system should be able to check the accuracy and completeness of a service order almost instantly and give a response. e.spire, however, proposes a liberal 4-hour turnaround for the FOC for electronically-submitted orders. Manual orders that require human intervention realistically take longer to process. For these, e.spire proposes a turnaround time of 24 hours. This should be ample time to make the very limited determinations required to issue a FOC.

Q. (ISSUE 53): SHOULD BELLSOUTH BE REQUIRED TO ADOPT A PRESCRIBED INTERVAL FOR "REJECT/ERROR" MESSAGES?

A. For reasons set forth in my answer to the previous question, it is essential that every step in the ordering process have a prescribed interval. Otherwise, this already ponderous process becomes even more troublesome and fraught with delays. If a service order submitted by e.spire is defective or underinclusive for some reason, it should be "kicked back" as soon as possible. This time frame should be a matter of hours for electronically submitted orders, and no more than a day for manually submitted orders.

Q. (ISSUE 54): SHOULD BELLSOUTH BE REQUIRED TO ESTABLISH A SINGLE POINT OF CONTACT FOR E.SPIRE'S ORDERING AND PROVISIONING, *I.E.*, FURNISHING THE NAME, ADDRESS, TELEPHONE NUMBERS AND EMAIL LINKS OF A KNOWLEDGEABLE EMPLOYEE THAT CAN ASSIST E.SPIRE IN ITS

ORDERING AND PROVISIONING, ALONG WITH APPROPRIATE FALL-BACK CONTACTS?

A. e.spire considers it a good business practice to identify persons who are responsible for providing service and interfacing on important issues. e.spire believes that it is reasonable to request from BellSouth that a person be designated to interface with e.spire on the all-important ordering and provisioning issues, and that his contact information be made available. In addition, a backup person or persons should be supplied in case the principal contact cannot be reached in any given situation. BellSouth's "account team" cannot perform this day-to-day contact and BellSouth's proposal to use the account team for this purpose is not a serious one. Under the current scenario, e.spire must go through 3 or 4 people to get an answer, often explaining the same situation all over again to each person on successive days. This is no way for BellSouth to support its customer.

Q. **(ISSUE 55): SHOULD BELLSOUTH BE REQUIRED TO ADOPT THE "TEXAS PLAN" OF PERFORMANCE PENALTIES FOR FAILURE TO PROVIDE SERVICE AT PARITY?**

A. As I mentioned earlier in my testimony, e.spire considers it essential that the various intervals and processes associated with BellSouth's provision of services and network elements to CLECs be assigned appropriate performance metrics, and if these metrics are violated, penalties should attach. Anyone who has spent any time examining performance metrics realizes that it is a fairly complex business, depending both on an appreciation of what time a given step or transaction should require, and at what point failure to confine performance to the metric should meet with a penalty or damages. Not only is it relatively complex, but it also becomes voluminous, since there are many discrete transactions that should be subjected to performance metrics and penalties or damages. The so-called "Texas Plan," which I have attached as **"Exhibit 5"** hereto, represents a good deal of work and thought, and instead of re-inventing the wheel in this jurisdiction, I believe we should take advantage of the good faith efforts that went into the Texas Plan by adopting it here. If it turns out that there are any peculiarities relating to Texas that create inequities when applied in South Carolina, this can be adjusted. But having such a well-thought-out "shell" to work with and apply is exceedingly valuable, because it saves a tremendous amount of time and effort on the part of both the industry and the Commission. For this reason, e.spire believes it is appropriate to adopt the "Texas Plan" for BellSouth, and make it applicable in this proceeding.

Q. (ISSUE 56): SHOULD BELLSOUTH BE REQUIRED TO ESTABLISH A NEW PERFORMANCE MEASUREMENT METRIC FOR THE PROVISIONING OF FRAME RELAY CONNECTIONS?

A. e.spire's business is heavily involved with frame relay, and it is essential that BellSouth be encouraged to provide e.spire with reasonable access, on a timely basis, with frame relay resale. BellSouth must furnish e.spire with the opportunity to resell BellSouth's frame relay network at wholesale rates, and, consistent with Section 251(c)(4)(B) of the 1996 Act, may not "impose unreasonable or discriminatory conditions or limitations." Part of this obligation is to avoid unreasonable or discriminatory delays or hindrances that make it unnecessarily timeconsuming and difficult for e.spire to resell BellSouth's frame relay network. And the way to ensure continued compliance, as noted above, is to establish standards for performance, and penalties or liquidated damages that result from non- performance or unsatisfactory performance. BellSouth does not presently have the required metrics for frame relay resale, but it should be required to establish them. This is an essential question for e.spire and for other carriers that also emphasize frame relay in their business plans.

Q. (ISSUE 57): SHOULD BELLSOUTH BE REQUIRED TO ESTABLISH A NEW PERFORMANCE METRIC FOR THE PROVISIONING OF EELS?

A. In view of the high importance of EELs to the competitive carrier such as e.spire, these network elements should be provisioned according to an established interval, and there should be consequences for BellSouth if the interval is not met. Since there is no existing performance metric for provisioning of an EEL, BellSouth should be required to establish one. Otherwise, BellSouth could make access to this network element unduly difficult and timeconsuming, thus hindering the development of competition.

Q. (ISSUE 58): SHOULD BELLSOUTH BE REQUIRED TO PROVIDE AN ELECTRONIC FEED SUFFICIENT TO ENABLE E.SPIRE TO CONFIRM THAT DIRECTORY LISTINGS OF ITS CUSTOMERS HAVE ACTUALLY BEEN INCLUDED IN THE DATABASES UTILIZED BY BELLSOUTH?

A. Yes, this is an important issue for e.spire. The problem is, very simply stated, that BellSouth's directory listings for e.spire's customers are prone to error. Although customers may not always take pleasure in seeing their name in print, they are consistently upset when their name is misspelled, or left out of a directory altogether. (Of course, it is also essential that e.spire's customers' numbers be available through directory assistance, and this is a separate, but related issue.)

In the case of the printed directory, although BellSouth publishes the directory, e.spire has arranged for its customers to appear in it – and the customer correctly holds e.spire responsible for errors and omissions. It is up to e.spire to establish the kind of relationship with BellSouth that provides a suitable degree of certainty that this transaction can be performed reliably. The problem is that e.spire really has little to do with the final product as it is published. Since BellSouth does not provide e.spire the actual electronic feed that goes to the printer, or actual galley proofs of the publication, it is impossible for e.spire to be sure that the directory as it is actually published will be accurate.

Q. HOW DOES E.SPIRE PROPOSE TO REDUCE THE INCIDENCE OF ERRORS IN THE DIRECTORY LISTINGS OF ITS CUSTOMERS PRIOR TO PUBLICATION OF DIRECTORIES?

A. e.spire has proposed language at Attachment 11 of the parties' draft interconnection agreement that requires BellSouth to provide information via an electronic interface sufficient for e.spire to confirm the validity of the directory listing information for its end users. The designated time frame during which e.spire should receive this electronic feed is within forty-eight (48) hours of when BellSouth sends this information to be published.

The language requested by e.spire will provide e.spire a meaningful opportunity to correct the information of its end users prior to it being published in directories. Once the information is published – or worse yet, not published – there is no opportunity for e.spire to correct any errors to the information included under its own customers' listings. After publication, it is foreseeable that errors in these listings may cause economic harm to e.spire's end users which may be attributable to the negligence of e.spire or BellSouth. If there are mistakes in the data provided by e.spire's order entry personnel, access to electronic confirmations will alert e.spire of the errors and give it the opportunity to notify BellSouth in order to have such errors corrected prior to publication.

Q. (ISSUE 59): **SHOULD BELLSOUTH AND BELLSOUTH ADVERTISING & PUBLISHING CORPORATION ("BAPCO") BE REQUIRED TO COORDINATE TO ESTABLISH A PROCESS WHEREBY INP TO LNP CONVERSIONS DO NOT REQUIRE A DIRECTORY LISTINGS CHANGE?**

A. BellSouth and its subsidiary BAPCO should collaborate to minimize the expense and disruption of converting from INP to LNP so that no directory listing change is required. Such conversions should be seamlessly performed, and BellSouth should commit to this in the Parties' agreement.

Q. (ISSUE 60): **SHOULD BAPCO BE REQUIRED TO PERMIT E.SPIRE TO REVIEW GALLEY PROOFS OF DIRECTORIES EIGHT WEEKS AND TWO WEEKS PRIOR TO PUBLISHING, AND COORDINATE CHANGES TO LISTINGS BASED ON THOSE PROOFS?**

A. e.spire requests that it be provided the opportunity to review the galley proofs of its customers' information in BellSouth's directories prior to publication of the proofs. Having sufficient time to review of the galley proofs of e.spire's end users will also contribute to the accuracy of the listings, provided e.spire has enough time to contact BellSouth or its publishing affiliate and correct any mistakes in the galley proofs, prior to publication.

Q. (ISSUE 61): SHOULD BAPCO BE REQUIRED TO DELIVER 100 COPIES OF EACH NEW DIRECTORY BOOK TO AN E.SPIRE DEDICATED LOCATION?

A. Yes. It is essential that e.spire be provided with sufficient copies of each new directory published by BAPCO on a timely basis. Delays in obtaining access to new publications, or obtaining a sufficient number of copies, can hamper e.spire's operations, and cause difficulties in serving its customers properly.

Q. (ISSUE 62): SHOULD BAPCO'S LIABILITY FOR ERRORS OR OMISSIONS BE LIMITED TO $1 PER ERROR OR OMISSION?

A. It is my understanding that BellSouth is demanding to limit its liability to e.spire to the amount of one dollar for any errors that get published in the directories. Such a limitation of liability is unacceptable to e.spire unless it has a reasonable opportunity to verify inclusion of its customer' listing information in advance of publication as we have proposed. Permitting such verification is in BellSouth's interest, since it would not only reduce the incidence of errors, but also would tend to dilute BellSouth's responsibility for errors.

Q. (ISSUE 63): SHOULD BAPCO'S LIABILITY IN E.SPIRE CUSTOMER CONTRACTS AND TARIFFS BE LIMITED?

A. No. This would not be appropriate. e.spire believes that BAPCO's conduct and performance is the best safeguard against liability to a third party entity. It is not appropriate for e.spire to include contract provisions in its customer contracts and tariffs that limit the liability of BAPCO except, I suppose, to the extent that BAPCO itself is a party to a contract, such that BAPCO would have defined responsibilities to defray, and would be entitled to certain contractual protections in return. This would not normally be the case. Apart from that, if BAPCO wishes to limit its liability to e.spire's customers, it should simply conform its behavior to acceptable business practices, and purchase insurance, or self-insure, for unusual circumstances. e.spire also believes that it would be most helpful for BAPCO to cooperate with BellSouth and e.spire to ensure that e.spire is directly involved with verifying the accuracy of listings for e.spire's customers. This would have the effect of reducing errors and may dilute BAPCO's responsibility in many cases.

Q. **(ISSUE 64): WHAT ARE THE APPROPRIATE RATES FOR THE FOLLOWING: SECURITY ACCESS, ASSEMBLY POINT, ADJACENT COLLOCATION, DSLAM COLLOCATION IN THE REMOTE TERMINAL, AND NON-ICB SPACE PREPARATION CHARGES?**

A. BellSouth's rates for these various services need to be consistent with the requirements of the Telecommunications Act, and the rules promulgated pursuant to that statute. As it stands now, there are a number of offerings for which rates have not been established by BellSouth, and certain services are provided on an Individual Cost Basis ("ICB") -- meaning that a competitive carrier has no idea in advance what a needed service is going to cost – and also signaling that BellSouth is at least attempting to reserve pricing flexibility for itself that may end up being discriminatory.

Q. HOW COULD ICB PRICING BE DISCRIMINATORY?

A. If there are no fixed prices, then every time a service is rendered, the price at that time could be different, depending on a variety of factors. Each different carrier could be charged a different amount for the same service – in fact, the same carrier could be charged different amounts for the same service rendered at different times. Of course there are some situations where it simply isn't possible to determine in advance what something will cost – truly extraordinary situations where a CLEC asks for a service to be rendered that is a case of first impression. BellSouth has been in this business for awhile, however, and I would venture to say that BellSouth rarely faces that situation. Most of the transactions between the ILEC and competitive carriers are transactions that can be priced in advance. This is just good planning, and it avoids potential anticompetitive misconduct.

Q. HOW DO YOU RECOMMEND THAT BELLSOUTH ESTABLISH PRICING FOR THE INDICATED SERVICES?

A. BellSouth should conduct cost studies and establish rates for these services based on forward-looking, incremental costs of offering them in accordance with procedures approved by the FCC and by this Commission. These cost studies should be subjected to public scrutiny in public hearings by the Commission, and the Commission should determine whether the rates so derived are consistent with applicable law and policy.

III. Conclusion

Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?

A. Yes. However, I reserve the right to modify and supplement my testimony after having an opportunity to examine BellSouth's responses to e.spire's discovery requests. On behalf of e.spire, I thank the Commission for its consideration of our positions in this arbitration.

Testimony of James C. Falvey

Exhibit 1

(Arbitration Issues Matrix)

EXHIBIT 1: E.SPIRE COMMUNICATIONS INC.'S ISSUES MATRIX
BELLSOUTH TELECOMMUNICATIONS, INC. ARBITRATION (REVISED AS OF 2/29/2000)

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
Issue 1. *Should BellSouth be required to pay liquidated damages for failure to (i) meet provisioning intervals prescribed in the agreement for UNEs, and (ii) provide service at parity as measured by the specified performance metrics?*	Yes	No	*GT&C § 18; GT&C Part B, § 1.64; Att. 9*	**ARBITRATE.**
Issue 2. *Should FCC and Commission orders which are "effective" or "final and non-appealable" be incorporated into the agreement?*	Effective	Final and non-appealable	*Att. 1§ 34.4, Att. 3 § 6.6.2*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 3. *Should a "fresh look" period be established which permits customers subject to BellSouth volume and term service contracts to switch to e.spire service without imposition of early termination penalties?*	Yes	Unknown	*§ 49*	**ARBITRATE.**
Issue 4. *Should BellSouth provide intraLATA toll service to e.spire local exchange service customers on the same basis that it provides intraLATA toll services to all customers of BellSouth local exchange services?*	Yes	No	*§ 50.2*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 5. *Should the definition of "local traffic" include dial-up calling to modems and servers of Internet Service Providers ("ISPs") located within the local calling area?*	Yes	No	*Att. 1 §§ 1.69, 1.92, 1.99, 1.100; Att. 3 §§ 6.1.1, 6.1.2, 6.1.3, 6.10*	**ARBITRATE.**
Issue 6. *Should the definition of "Switched Exchange Access Service" and "Switched Access Traffic" include Voice-over-Internet*	No	Yes	*Att. 1§ 1.111; Att. 3 § 6.8.1*	**ARBITRATE.**

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
Protocol ("VOIP") transmissions?				
Issue 7. *Should e.spire's local switch be classified as both a tandem and end office switch for purposes of billing reciprocal compensation?*	Yes	No	*§ 1.113*	**ARBITRATE.**
Issue 8. *Should BellSouth be required to lower rates for manual submission of orders, or, alternatively, establish a revised "threshold billing plan" that (i) extends the timeframe for migration to electronic order submission and (ii) deletes services which are not available through electronic interfaces from the calculation of threshold billing amounts?*	Yes	No	*Att. 1 Exh. A; Att. 2 § 17.2; Att. 3 § 8; Att. 5 § 5*	**ARBITRATE.**
Issue 9. *Should BellSouth be required to provide reasonable and nondiscriminatory access to unbundled network elements ("UNEs") in accordance with all effective rules and decisions of the FCC and this Commission?*	Yes	Unknown	*§ 1.8*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 10. *Should BellSouth be required to provide e.spire with access to existing combinations of UNEs in BellSouth's network at UNE rates?*	Yes	Unknown	*§ 1.9*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 11. *Should BellSouth be required to provide access to enhanced extended links ("EELs") at UNE rates where the loop and transport elements are currently combined and purchased through BellSouth's special access tariff?*	Yes	Unknown	*§ 1.10*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
				BellSouth.
Issue 12. *If BellSouth provides access to EELs at UNE rates where the loop and transport elements are currently combined and purchased through BellSouth's special access tariff, should e.spire be entitled to utilize the access service request ("ASR") process to submit orders?*	Yes	Unknown		**ARBITRATE.**
Issue 13. *If e.spire submits orders for EELs, should BellSouth be required to make the resultant billing conversion within 10 days?*	Yes	Unknown	*§ 1.10*	**ARBITRATE.**
Issue 14. *Should BellSouth be prohibited from imposing non-recurring charges other than a nominal service order fee for EEL conversions?*	Yes	Unknown	*§ 1.10*	**ARBITRATE.**
Issue 15. *Should the parties utilize the FCC's most recent definition of "local loop" included in the UNE Remand Order?*	Yes	Unknown	*§ 2.2.1*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 16. *Should BellSouth be required to condition loops as necessary to provide advanced services in accordance with the FCC's UNE Remand Order?*	Yes	Unknown	*§ 2.5*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 17. *Should the parties utilize the FCC's most recent definition of network interface device ("NID") included in the UNE Remand Order?*	Yes	Unknown	*§ 4.1.1*	**CLOSED.** Issue closed during follow-up negotiations between e.spire

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
				(B.M.) and BellSouth.
Issue 18. *Should BellSouth be required to offer subloop unbundling in accordance with the FCC's UNE Remand Order?*	Yes	Unknown	*§ 6*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 19. *Should BellSouth be required to provide access to local circuit switching, local tandem switching and packet switching capabilities on an unbundled basis in accordance with the FCC's UNE Remand Order?*	Yes	Unknown	*§ 7.1.1*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 20. *Should the parties utilize the definitions of local circuit switching, local tandem switching and packet switching included in the FCC's UNE Remand Order?*	Yes	Unknown	*§§ 7.2, 7.3, 7.4, 7.7*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 21. *Should BellSouth be required to provide nondiscriminatory access to interoffice transport/transmission facilities in accordance with the terms of the FCC's UNE Remand Order?*	Yes	Unknown	*§ 8*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 22. *Should the parties utilize a definition of interoffice transport consistent with the usage in the FCC's UNE Remand Order, that includes dark fiber, DS1, DS3, OCn levels and shared transport?*	Yes	Unknown	*§ 8.1*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and

EXHIBIT 1: REVISED ARBITRATION ISSUES MATRIX FOR AL, FL, GA, KY, AND SC/5

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
				BellSouth.
Issue 23. *Should BellSouth provide nondiscriminatory access to operations support systems ("OSS") and should the parties utilize a definition of OSS consistent with the FCC's UNE Remand Order?*	Yes	Unknown	*§ 17.2*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 24. *Should BellSouth be required to provide specific installation intervals in the agreement for EELs and each type of interoffice transport*	Yes	Unknown	*§ 8.4*	**ARBITRATE.**
Issue 25. *Should BellSouth be compelled to establish geographically-deaveraged rates for NRCs and recurring charges for all UNEs?*	Yes	Unknown	*§ 2.1.2*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 26. *Should BellSouth be required to establish TELRIC-based rates for the UNEs, including the new UNEs, required by the UNE Remand Order?*	Yes	Unknown	*§§1.8, 2.1.*	**ARBITRATE.**
Issue 27: *Should both parties be allowed to establish their own local calling areas and assign numbers for local use anywhere within such areas, consistent with applicable law?*	Yes	Unknown	*§§ 1.2, 1.9 and 1.10.1*	**ARBITRATE.**
Issue 28 *In the event that e.spire chooses multiple tandem access ("MTA"), must e.spire establish points of interconnection at all BellSouth access tandems where e.spire's NXX's are "homed"?*	No	Yes	*§§ 1.2; 1.9*	**ARBITRATE.**

EXHIBIT 1: REVISED ARBITRATION ISSUES MATRIX FOR AL, FL, GA, KY, AND SC/6

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
Issue 29. *Should language concerning local tandem interconnection be simplified to exclude, among other things, the requirement to designate a "home" local tandem for each assigned NPA/NXX and the requirement to establish points of interconnection to BellSouth access tandems within the LATA on which e.spire has NPA/NXXs "homed"?*	Yes	No	*§ 1.10.1*	**ARBITRATE.**
Issue 30. *Should CPN/PLU/PIU be the exclusive means used to identify the jurisdictional nature of traffic under the agreement?*	Yes	No	*§§ 6.2, 6.3, 6.4*	**ARBITRATE.**
Issue 31. *Should all references to BellSouth's Standard Percent Local Use Reporting Platform be deleted?*	Yes	No	*§ 6.3*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 32. *Should specific language be included precluding IXCs from using "transit" arrangements to route traffic to e.spire?*	No	Unknown	*§ 6.9*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 33. *How should the parties compensate each other for interconnection of their respective frame relay networks?*	Same compensation mechanism that applies to circuit-switched services should apply to packet-switched services	Unknown	*§§ 7.5.5, 7.6, 7.8 and 7.9.1*	**ARBITRATE.**
Issue 34. *Should BellSouth's rates for frame relay interconnection be established at TELRIC?*	Yes	Unknown	*§§ 7.5.5, 7.6, 7.8 and 7.9*	**ARBITRATE.**

EXHIBIT |: REVISED ARBITRATION ISSUES MATRIX FOR AL, FL, GA, KY, AND SC/7

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
Issue 35. *Should BellSouth be required to establish prescribed intervals for installation of interconnection trunks?*	Yes	Unknown	*§ 2.7*	**ARBITRATE.**
Issue 36. *Should the charges and the terms and conditions set forth in e.spire's tariff govern the establishment of interconnecting trunk groups between BellSouth and e.spire?*	Yes	No	*§2.3*	**ARBITRATE.**
Issue 37. *For two-way trunking, should the parties be compensated on a pro rata basis?*	Yes	No	*§2.3*	**ARBITRATE.**
Issue 38. *Should e.spire be permitted the option of running copper entrance facilities to its BellSouth collocation space in addition to fiber?*	Yes	No	*§ 5.2*	**ARBITRATE.**
Issue 39. *Should e.spire be required to pay a Subsequent Application Fee to BellSouth for installation of co-carrier cross connects even when e.spire pays a certified vendor to actually perform the work?*	No	Yes	*§ 5.6.1*	**ARBITRATE.**
Issue 40. *Should BellSouth be required to respond to all e.spire applications for physical collocation space within 45 calendar days of submission?*	Yes	No	*§ 6.2*	**ARBITRATE.**
Issue 41. *When BellSouth responds to an e.spire application for physical collocation by offering to provide less space than requested, or space configured differently than requested, should such a response be treated as a denial of the application sufficient to entitle e.spire to conduct a central office tour?*	Yes	No	*§ 6.2*	**ARBITRATE.**

EXHIBIT 1: REVISED ARBITRATION ISSUES MATRIX FOR AL, FL, GA, KY, AND SC/8

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
Issue 42. *Should the prescribed intervals for response to collocation requests be shortened from the BellSouth standard proposal?*	Yes	No	*§§ 6.2, 6.4*	**ARBITRATE.**
Issue 43. *Should BellSouth be permitted to extend its collocation intervals simply because e.spire changes its application request?*	No	Yes	*§ 6.3*	**ARBITRATE.**
Issue 44. *Should the prescribed intervals for completion of physical collocation space be shortened from the BellSouth standard proposal?*	Yes	No	*§ 6.4*	**ARBITRATE.**
Issue 45. *Should BellSouth be permitted to impose non-recurring charges on e.spire when converting existing virtual collocation arrangements to cageless physical collocation?*	No	Yes	*§ 6.9*	**ARBITRATE.**
Issue 46. *Should BellSouth be permitted to place restrictions not reasonably related to safety concerns on e.spire's conversions from virtual to cageless physical collocation arrangements?*	No	Yes	*§ 6.9*	**ARBITRATE.**
Issue 47. *Should BellSouth permit e.spire to view the rates charged and features available to end users in the customer service record ("CSR").*	Yes	No	*§ 2.2.5*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 48. *Should BellSouth be required to provide flow through of electronic orders and processes at parity?*	Yes	Unknown	*§ 2.3.5*	**CLOSED.** Issue closed during follow-up negotiations

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
				between e.spire (B.M.) and BellSouth.
<u>Issue 49.</u> *Should BellSouth be authorized to impose order cancellation charges?*	No	Yes	*§ 3.7*	**<u>CLOSED.</u>** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
<u>Issue 50.</u> *Should BellSouth be required to provide readily available results of UNE pre-testing to e.spire?*	Yes	No	*§ 3.15*	**<u>ARBITRATE.</u>**
<u>Issue 51.</u> *Should BellSouth be permitted to impose order expedite surcharges when it refuses to pay a late installation penalty for the same UNEs?*	No	Yes	*§ 3.20*	**<u>ARBITRATE.</u>**
<u>Issue 52.</u> *Should BellSouth be required to adopt intervals of 4 hours (electronic orders) and 24 hours (manual orders) for the return of firm order commitments ("FOCs")?*	Yes	No	*§ 3.22*	**<u>ARBITRATE.</u>**
<u>Issue 53.</u> *Should BellSouth be required to adopt a prescribed interval for "reject/error" messages?*	Yes	No	*§ 3.23*	**<u>ARBITRATE.</u>**
<u>Issue 54.</u> *Should BellSouth be required to establish a single point of contact ("SPOC") for e.spire's ordering and provisioning, e.g., furnishing the name, address, telephone numbers and e-mail links of knowledgeable employee that can assist e.spire in its ordering and provisioning, along with appropriate fall-back contacts?*	Yes	Unknown	*§ 3.2.1*	**<u>ARBITRATE.</u>**

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
Issue 55. *Should BellSouth be required to adopt the "Texas Plan" of performance penalties for failure to provide service at parity?*	Yes	No	*Att. 9 App. E*	ARBITRATE.
Issue 56. *Should BellSouth be required to establish a new performance measurement metric for the provisioning of frame relay connections?*	Yes	Unknown	*Att. 9 App. F*	ARBITRATE.
Issue 57. *Should BellSouth be required to establish a new performance metric for the provisioning of EELs?*	Yes	No	*Att. 9 App. F*	ARBITRATE.
Issue 58. *Should BellSouth be required to provide an electronic feed sufficient to enable e.spire to confirm that directory listings of its customers have actually been included in the databases utilized by BellSouth?*	Yes	No	*§ 3(i)*	ARBITRATE.
Issue 59. *Should BellSouth and BellSouth and BellSouth Advertising & Publishing Corporation ("BAPCO") be required to coordinate to establish a process whereby INP-to-LNP conversions do not require a directory listing change?*	Yes	No	*§ 3(k)*	ARBITRATE.
Issue 60. *Should BAPCO be required to permit e.spire to review galley proofs of directories eight weeks and two weeks prior to publishing, and coordinate changes to listings based on those proofs?*	Yes	No	*§ 3(j)*	ARBITRATE.
Issue 61. *Should BAPCO be required to deliver 100 copies of each new directory book*	Yes	No	*§ 3(l)*	ARBITRATE.

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
to an e.spire dedicated location?				
Issue 62. *Should BAPCO's liability for errors or omissions be limited to $1 per error or omission?*	No	Yes	*§ 5(a)*	**ARBITRATE.**
Issue 63. *Should BAPCO's liability in e.spire customer contracts and tariffs be limited?*	No	Yes	*§ 5(b)*	**ARBITRATE.**
Issue 64. *What are the appropriate rates for the following: Security Access, Assembly Point, Adjacent Collocation, DSLAM collocation in the remote terminal, and non-ICB space preparation charges.*	The rates should be consistent with the requirements of the Telecommunications Act.	In its answer, BellSouth claims that it will file appropriate rates for each of the stated items, as well as cost studies in support of the proposed rates.		**ARBITRATE.** This issue was raised by BellSouth in its answer to e.spire's petition.

Testimony of James C. Falvey

<u>Exhibit 2</u>

(Diagram of e.spire's network – CONFIDENTIAL)

Note: This document will be not be provided with the public copy of this Direct Testimony, but will be filed under separate cover pursuant to a confidentiality agreement between the parties.

Testimony of James C. Falvey

Exhibit 3

(Decision of the North Carolina Utilities Commission approving tandem treatment of CLEC switch in Docket P-582, Sub 6 – ICG Telecom Group, issued March 1, 2000)

EXHIBIT 3

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-582, SUB 6

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition by ICG Telecom Group, Inc. For Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252 (b) of the Telecommunications Act of 1996	ORDER RULING ON OBJECTIONS, REQUEST FOR CLARIFICATION, RECONSIDERATION, AND COMPOSITE AGREEMENT

BEFORE: Jo Anne Sanford, Chair; and Commissioners Robert V. Owens, Jr. and Sam J. Ervin, IV

BY THE COMMISSION: On November 4, 1999, the Commission entered its Recommended Arbitration Order (RAO) in this docket. As part of that Order, the Commission made the following

FINDINGS OF FACT

1. The parties should, as an interim inter-carrier compensation mechanism, pay reciprocal compensation for dial-up calls to Internet Service Providers (ISPs) at the rate the parties have agreed upon for reciprocal compensation for local traffic and as finally determined by this Order, subject to true-up at such time as the Commission has ruled pursuant to future Federal Communications Commission (FCC) consideration of this matter.

2. ICG Telecom Group, Inc.'s (ICG's) Charlotte switch serves an area comparable to that served by BellSouth Telecommunications, Inc.'s (BellSouth's) Charlotte tandem switch and ICG's switch also provides the same functionality as that provided by BellSouth's tandem switch. For reciprocal compensation purposes, ICG is entitled to compensation at the tandem interconnection rate (in addition to the other appropriate rates) where its switch serves a geographic area comparable to that served by BellSouth's tandem switch.

3. The Commission declines to decide at this time whether BellSouth should be required to commit to provisioning the requisite network buildout and necessary support. The Commission encourages BellSouth and ICG to continue to negotiate on this issue. Further, the Commission notes that since a similar provision is found in BellSouth's Revised Statement of Generally Available Terms (SGAT) and at least one interconnection agreement, it would appear reasonable for a similar provision to be voluntarily included in the BellSouth/ICG interconnection agreement.

4. The issue of performance measurements and liquidated damages has been, in essence, withdrawn from the arbitration and accordingly is not in need of resolution in this docket. Further, the Commission will create a new docket, Docket No. P-100, Sub 133k, and issue an Order in that docket establishing the generic docket and requesting that the industry, the Public Staff, the Attorney General, and any other interested parties form a Task Force to attempt to agree on all potential issues concerning performance measurements and enforcement mechanisms. Further, the Commission will issue an Order in Docket No. P-100, Sub 133i (AT&T's Petition for Third-Party Testing) stating that

the Commission is investigating performance measurements in a generic docket as a first step, but will keep the third-party testing docket open for future consideration.

On December 6, 1999, BellSouth filed its Objections and Request for Clarification and Reconsideration with an additional letter filed on December 14, 1999, correcting the citations referenced in its Objections and Request for Clarification and Reconsideration. BellSouth stated in its Objections and Request for Clarification and Reconsideration that it seeks clarification and reconsideration concerning: (1) the interim inter-carrier compensation plan adopted by the Commission for ISP traffic; and (2) the Commission's determination that ICG is entitled to reciprocal compensation at BellSouth's tandem interconnection rate. BellSouth stated that it seeks clarification of the RAO on two points. First, BellSouth stated that it desires confirmation that any compensation paid pursuant to the interim inter-carrier compensation plan will be trued-up retroactively to the effective date of the Interconnection Agreement resulting from this Arbitration in accordance with the mechanism established by the FCC and the Notice of Proposed Rulemaking (CC Docket 99-68). Second, BellSouth stated that it seeks clarification that the true-up will be triggered, and based on, an effective order by the FCC in CC Docket 99-68 which ensures the most expeditious resolution of this issue for all competing local providers (CLPs) and incumbent local exchange companies (ILECs) operating under the Commission's interim inter-carrier compensation plan. Finally, BellSouth requested the Commission to reconsider its position on the interim inter-carrier compensation rates for ISP-bound traffic and consider an alternative for the payment of those rates and to reconsider its conclusion that ICG is entitled to reciprocal compensation at the tandem interconnection rate.

On December 14, 1999, ICG filed a letter confirming its intentions to file on or before December 21, 1999, a response to BellSouth's Objections and Request for Clarification and Reconsideration.

On December 22, 1999, ICG filed its Opposition to BellSouth's Objections and Request for Clarification and Reconsideration. ICG maintained that BellSouth's filing is nothing more than a rehash of arguments already considered and rejected by the Commission. ICG further maintained that BellSouth's request for clarification is unclear. ICG concluded that neither of the requested clarifications is in any way necessary.

On January 3, 2000, the Public Staff filed its Response to Request for Reconsideration. The Public Staff stated that the single issue it wished to address concerned whether ICG should be compensated for tandem switching. The Public Staff stated that it did not address this issue in its Proposed Order in this docket, however, it now believes that the Commission should reconsider and reverse its finding on this issue on the grounds that ICG failed to demonstrate that its switch provides the tandem function in terminating a call delivered to it by the LEC.

On January 10, 2000, ICG filed its Reply to the Public Staff's Response. ICG maintained that the Commission correctly concluded that FCC Rule 51.117 provides a single criterion for tandem rate eligibility and that though not required, the record demonstrates that ICG's switch functions as a tandem. ICG recommended that the Commission deny BellSouth's Request for Reconsideration.

On January 20, 2000, the Commission issued an Order Regarding Maps. The Commission required ICG and BellSouth to submit as late-filed exhibits a map showing ICG's network with relevant switches in North Carolina overlaid against the geographic area which BellSouth's tandem switch serves and the number of BellSouth central offices ICG is presently collocated in within North Carolina by no later than January 23, 2000.

On January 20, 2000, BellSouth filed the Final Order of the Florida Public Service Commission in its ICG/BellSouth arbitration docket.

On February 7, 2000, BellSouth filed its maps in response to the Commission's January 10, 2000 Order. ICG also filed its maps in response to the Order on February 7, 2000.

On February 14, 2000, ICG filed a Notice of Supplemental Authority which included decisions of the Alabama and Georgia Public Service Commissions.

On February 14, 2000, ICG filed a letter to protest the letter filed by BellSouth with its maps stating that BellSouth used its transmittal letter as an opportunity to present its arguments on the tandem rate eligibility issue.

Discussions and Commission conclusions regarding the issues raised by BellSouth in its Objections and Request for Clarification and Reconsideration follow. These matters are addressed below by reference to the specific Findings of Fact which coincide with those findings set forth in the Commission Order entered in this docket on November 4, 1999, which are the subject of said Objections and Request for Clarification and Reconsideration.

FINDING OF FACT NO. 1: Until the FCC adopts a rule with prospective application, should dial-up calls to ISPs be treated as if they were local calls for the purposes of reciprocal compensation?

INITIAL COMMISSION DECISION

The Commission concluded that the parties should, as an interim inter-carrier compensation mechanism, pay reciprocal compensation for dial-up calls to ISPs at the rate the parties have agreed upon for reciprocal compensation for local traffic and as finally determined by the Commission's Order in this docket, subject to true-up at such time as the Commission has ruled pursuant to future FCC consideration of this matter.

COMMENTS/OBJECTIONS

BELLSOUTH: BellSouth has asked the Commission for clarification or reconsideration of the following:

1. Confirmation that any compensation paid pursuant to the interim inter-carrier compensation mechanism will be trued-up retroactively to the effective date of the Interconnection Agreement resulting from this Arbitration. BellSouth requested clarification on this point because of the dual true-up referenced by the Commission in its RAO _ (1) an interim true-up based on the establishment of final unbundled network element (UNE) rates and (2) a final true-up based on the upcoming FCC decision. BellSouth believes that the reciprocal compensation rates should be trued-up once the Commission establishes rates in the UNE docket without regard to any action from the FCC.

2. Clarification regarding the procedure that the parties are to utilize to effectuate the true-up. BellSouth argued that the true-up should be triggered and based upon an effective Order by the FCC. Theoretical alternative dates would be when the FCC decision is released, or as the

Commission has implied, after Commission action pursuant to that Order.

3. Reconsideration of the interim-carrier compensation rates for ISP-bound traffic and consideration of an alternative for payment of those rates. BellSouth noted that the Commission had established interim inter-carrier compensation rates at the same level as reciprocal compensation rates for local traffic but, in light of the fact that the interim inter-carrier compensation plan adopted here will be the template for other agreements, BellSouth argued that the rates paid for ISP-bound traffic should reflect the longer holding times associated with ISP-bound traffic. Specifically, BellSouth stated it is willing to accept the 20-minute call duration originally proposed by ICG in this Arbitration. This would yield a minute of use (MOU) total rate of $0.0022806.

BellSouth also requested that the Commission reconsider its ruling regarding payment and allow BellSouth to make payments pursuant to the plan in an interest-bearing escrow account. BellSouth cited substantial risk that it would be unable to recover those funds at final true-up, especially from smaller CLPs.

ICG: ICG urged the Commission to reject BellSouth's request that it modify the inter-carrier compensation rates for ISP-bound traffic based on an average call length (ACL) factor of 20 minutes. ICG argued that the costs it incurs for delivering calls to BellSouth customers are the same regardless of whether the called party is an ISP and thus there is no basis for a different compensation rate. ICG also chided BellSouth for attempting to insert new data in this proceeding purporting to show that the flow of compensation would be one-sided on a statewide basis by citing evidence in another proceeding (BellSouth/Time Warner, Docket No. P-472, Sub 15). Finally, ICG also maintained that BellSouth had not presented the Commission with a workable, alternative compensation mechanism.

ICG further noted that the 20-minute ACL proposal had been originally submitted by ICG itself in response to the Commission's Order seeking alternative approaches to compensation, but that the ICG proposal assumed that the proposed rate would be applied to all calls, not just ISP-bound calls. Moreover, ICG had noted that it had not done a study of actual call lengths and that the 20-minute figure was an "overly conservative" estimate of actual call lengths. In any event, the Commission rejected the ACL proposal. BellSouth is also using the new costs/rates which it proposed in the UNE docket, but these are final rates and not in effect yet. ICG further stated that ISP-bound calls are indistinguishable from other calls; thus there is not a reliable way to identify them.

With respect to BellSouth's requests for clarification, ICG expressed puzzlement. To the extent that BellSouth is asking whether the true-up will be to the final UNE rates and will occur when the FCC issues its final ruling, this would appear consistent with the Order. The true-up, however, should not occur upon the effective date of the FCC Order, since the Commission has made it plain that subsequent proceedings to implement the FCC ruling will be needed.

ICG emphatically rejected BellSouth's proposal that the payments be held in escrow as the Commission did in its original ruling.

PUBLIC STAFF: The Public Staff did not address this issue in its Response to Request for Reconsideration.

DISCUSSION

There are two major issues for consideration. The first is BellSouth's request for an alternative inter-carrier compensation mechanism based on a 20-minute ACL rather than one based on the sum of certain UNE rates. The other is BellSouth's request for clarification.

With respect to the first item, the Commission sees no reason to depart from the decision that it has already made on this matter. It is, to say the least, ironic for BellSouth to propose what in essence was a tentative proposal, later withdrawn, originally made by ICG in response to the Commission's request for "creative thinking" on inter-carrier compensation. Apparently, the merits of this proposal became obvious to BellSouth only after its own proposal was rejected. Meanwhile, the merits have become less persuasive to ICG, since it extensively critiqued the deficiencies of the ACL proposal in its reply to BellSouth. This only fortifies the Commission's belief that it would be on the right track to stand by an interim mechanism that is relatively simple and straight forward and tracks the reciprocal compensation rates applicable to other calls.

With respect to BellSouth's request for clarification regarding the inter-carrier compensation rates for ISP-bound traffic, the Commission makes the following clarification:

1. There is to be a first true-up applicable to all traffic subject to reciprocal compensation when the interim UNE rates become final UNE rates. However, if the final UNE rates are effective before the Interconnection Agreement becomes effective, then the final UNE rates will apply, and no such true-up will be necessary. The true-up will be retroactive to the effective date of the Interconnection Agreement resulting from this Arbitration.

2. There is to be a second true-up applicable to ISP-bound traffic at such time as the Commission has issued an Order setting up a permanent inter-carrier compensation mechanism for ISP-bound traffic. The true-up will be retroactive to the effective date of the Interconnection Agreement resulting from this Arbitration.

Finally, with respect to BellSouth's request that BellSouth be allowed to make payments into an interest-bearing escrow account rather than to the CLPs, the Commission finds it appropriate to reject this proposal for the reasons originally set out in the RAO.

CONCLUSIONS

The Commission upholds and reaffirms its original decision in this regard. Further, the Commission finds it appropriate to clarify the true-up process as outlined above.

FINDING OF FACT NO. 2: For purposes of reciprocal compensation, should ICG be compensated for end office, tandem, and transport elements of termination where ICG's switch services a geographic area comparable to the area served by BellSouth's tandem switch?

INITIAL COMMISSION DECISION

The Commission concluded that ICG's Charlotte switch serves an area comparable to that served by BellSouth's Charlotte tandem switch and ICG's switch also provides the same functionality as that provided by BellSouth's tandem switch. For reciprocal compensation purposes, the Commission found that ICG is entitled to compensation at the tandem interconnection rate (in addition to the other appropriate rates) where its switch serves a geographic area comparable to that served by BellSouth's tandem switch.

COMMENTS/OBJECTIONS

BELLSOUTH: BellSouth contended that in its RAO, the Commission relied heavily on FCC *Rule* 51.711(a)(3), and failed to consider the FCC's *discussion* of Rule 51.711, which sets forth a two-prong test that must be satisfied prior to a CLP being entitled to reciprocal compensation at the ILEC's tandem interconnection rate. BellSouth noted that, in its discussion, the FCC identified two requirements that ICG, or any CLP, must satisfy in order to be compensated at the tandem interconnection rate: (1) the CLP's network must perform functions similar to those performed by the ILEC's tandem switch; and (2) the CLP's switch must serve a geographic area comparable to the geographic area served by the ILEC.

BellSouth stated that ICG failed to satisfy the first prong of the FCC's two-prong test because ICG's network does not actually perform functions similar to those performed by BellSouth's tandem switch. While ICG's switch may be capable of performing tandem switching functions when connected to end office switches, capability is not the test. Throughout the testimony, ICG repeatedly concluded that ICG's switch "performs the same functionality as the BellSouth tandem switch and end office switch combined." ICG, however, did not offer any evidence to support a conclusion that the ICG switch actually performs functions similar to BellSouth's tandem switch.

BellSouth contended that the only evidence presented by ICG concerning switch functionality revolved around a network diagram attached to witness Starkey's direct testimony. (Starkey direct, at page 22 - diagram 3.) Based on ICG's network diagram, it is clear that: (1) ICG does not interconnect end offices or perform trunk-to-trunk switching, but rather performs line-to-trunk or trunk-to-line switching; (2) to the extent ICG has a switch in North Carolina, it performs only end-office switching functions and does not switch BellSouth's traffic to another ICG switch; and (3) based on the information provided, ICG's switch does not provide other centralization functions, namely call recording, routing of calls to operator services, and signaling conversion for other switches, as BellSouth's tandems do and as required by the FCC's rules.

BellSouth argued that while ICG witness Starkey insists that ICG's switch performs the same functions as a BellSouth tandem switch, the network design included in witness Starkey's testimony shows that each of ICG's collocation arrangements serve only as an intermediate point in ICG's loop plant. Without specific information from ICG to the contrary, the "piece of equipment" in ICG's collocation cage appears to be nothing more than a Subscriber Loop Carrier, which is part of loop technology and provides no "switching" functionality. ICG's switch is not providing a transport or tandem function, but is switching traffic through its end office for delivery of traffic from that switch to the called party's premises. No switching is performed in these collocation arrangements. These lines are simply long loops transported to ICG's switch; they are not trunks. Long loop facilities do not quality as facilities over which local calls are transported and terminated as described by the Telecommunications Act of 1996 (TA96) and therefore are not eligible for reciprocal compensation.

BellSouth stated that other state commissions have rejected arguments that a CLP's switch performs the same functions as a tandem switch. BellSouth specifically referenced orders by the Florida Public Service Commission which concluded that "...MCI is not entitled to compensation for transport and tandem switching unless it actually performs each function." Order No. PSC-97-0294-FOF-TP, Docket 962121-TP, at 1011 (March 14, 1997), and also Order No. PSC-96-1532-FOF-TP, Docket No. 960838-TP, at 4 (December 16, 1996) which concluded that "...evidence in the record does not support MFS' position that its switch provides the transport element; and the Act does not contemplate that the compensation for transporting and terminating local traffic should be symmetrical when one party does not actually use the network facility for which it seeks compensation."

BellSouth argued that even assuming ICG's switch performs the same functions as BellSouth's tandem switch, there is no evidence in the record that ICG's switch serves a geographic area comparable to BellSouth's tandem switch. BellSouth pointed out there is a distinction between actually serving and being capable of serving. BellSouth stated that, in fact, other than generally referencing ICG switches, there is no record evidence that ICG has a switch in North Carolina.

BellSouth contended that when it attempted to determine the number of customers ICG has in North Carolina, ICG conveniently refused, claiming that such information was proprietary. BellSouth stated that ICG also failed to identify where the unknown number of customers are located - information that is essential to support a finding that ICG's switch serves a comparable geographic area. BellSouth contended that under no set of circumstances could ICG seriously argue in such a case that its switch services a comparable geographic area to BellSouth. See Decision 99-09-069, In Re: Petition of Pacific Bell for Arbitration of an Interconnection Agreement with MFS/WorldCom, Application 99-03-047, at 15-16 (September 16, 1999) California Public Service Commission (finding "unpersuasive" MFS's showing that its switch served a comparable geographic area when many of MFS's ISP-bound customers were actually collocated with MFS's switch.)

BellSouth contended that ICG failed to make a showing that its network performs functions similar to those performed by BellSouth's tandem switch and that its switch serves a geographic area comparable to BellSouth's. For these reasons, BellSouth argued that the Commission should reconsider its decision and deny ICG's request for reciprocal compensation at the tandem interconnection rate.

ICG: ICG contended that the Commission's determination that ICG is entitled to reciprocal compensation at BellSouth's tandem interconnection rate is supported by the evidence of record. In response to BellSouth's claim that the Commission failed to consider the FCC's discussion of Rule 51.711, specifically, that the Commission failed to address both parts of the FCC's two-prong test, ICG contended that the Commission did consider BellSouth's contention that Rule 51.711 contains a two criterion test _ and squarely rejected it. The Commission expressly held that the FCC "requires only that a CLP's switch serve a geographic area comparable to that served by an ILEC's tandem to qualify for the tandem termination rates." The Commission should summarily reject BellSouth's attempt to re-argue a point on which the Commission has clearly, and correctly, ruled.

ICG further argued that the only relevant criterion is whether ICG's switch serves a geographic area comparable to that served by BellSouth's tandem. BellSouth simply refuses to recognize that the evidence it claims to be nonexistent is amply spread throughout the record and that it is totally consistent with the Commission's findings and conclusions on this issue. ICG witnesses Starkey and Schonhaut presented evidence demonstrating that ICG's switch serves a comparable geographic area to that served by BellSouth's tandem switch.

ICG contended that the record evidence is uncontroverted. BellSouth has not so much as suggested, much less proven, that the geographic area served by its tandem switch is not comparable to the area served by ICG's switch. Nor did BellSouth introduce any evidence whatsoever and did not cross-examine ICG's witnesses on this point.

ICG further contended that the record in this proceeding clearly demonstrates that ICG's switch also provides the same functionality as BellSouth's tandem. As ICG witness Starkey testified: "ICG's switching platform transfers traffic amongst discrete network nodes that exist in the ICG network for purposes of serving groups of its customers in exactly the same fashion that [BellSouth's] tandem switch distributes traffic."

ICG argued that BellSouth misses the point of Rule 51.711. BellSouth essentially argues that ICG's switch cannot meet the tandem switching definition because ICG's switch does not route traffic between other ICG switches. Rule 51.711 contemplates that a single CLP switch will serve the same function in the CLP's network that a tandem and multiple serving central office switches serve in the ILEC's network. The rule would be rendered meaningless if CLPs were required to duplicate the ILEC's network architecture in order to qualify for the tandem rate. The FCC made clear that in constructing their networks CLPs may opt to use new technologies that were unavailable when the ILEC's networks were designed: "... states shall ... consider whether new technologies (e.g. fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and, thus, whether some or all calls terminating on the new entrant's network should qualify for the tandem rate." ICG contended that its fiber ring is precisely the sort of new technology the FCC had in mind when it adopted Rule 51.711.

In its Reply to the Public Staff's Response to Request for Reconsideration, ICG restated that Rule 51.711 of the FCC rules provides a single criterion for tandem rate eligibility _ whether the competing carrier's switch serves an area comparable to that of the ILEC's tandem switch. ICG maintained that the Commission thus correctly rejected the Public Staff's argument that, in order to qualify for the tandem rate, Rule 51.711 requires a competing carrier to also demonstrate that its switch provides functionality similar to that provided by the incumbent's tandem switch.

ICG maintained that Rule 51.711 speaks for itself and is unambiguous. If a competing carrier is able to make the geographic showing, it is entitled to the tandem rate, regardless of whether it is able to make the functionality showing.

ICG suggested that the Public Staff's Response should be disregarded and that BellSouth's Request should be denied. As noted in ICG's Opposition to BellSouth's Request, ICG's evidence that the ICG switch serves an area comparable to that served by the BellSouth tandem is uncontroverted in the record.

ICG also contended that even though it is not required, the record demonstrates that ICG's switch functions as a tandem. ICG explained that its witness Starkey offered detailed testimony explaining the configuration of ICG's network and specifically addressed the switch functionality issue. Witness Starkey testified that ICG's network consists of a Lucent 5ESS switch which performs both Class 4 and Class 5 functions, SONET nodes collocated at BellSouth end offices and in ICG on-network buildings, and a fiber optic ring.

ICG contended that the fact that ICG's network incorporates collocated SONET nodes instead of Class 5 central office switches, as BellSouth witness Varner pointed out in his direct testimony, is irrelevant. This difference in architecture between the two networks is a result of the technology each carrier has chosen in an effort to best serve its particular customer base. Witness Starkey testified:

> At the time the majority of the ILEC network was built, switches were very limited

> in the number of individual lines they could service and copper plant was the most expensive portion of the network to deploy. Therefore, ILECs chose to trade switching costs for copper plant costs by deploying greater numbers of switches and shorter copper loops. However, with the advent of relatively inexpensive fiber optic transport facilities and the enormous switching capacity available in today's switching platforms, the economics of the switch/transport tradeoff have changed.

As witness Starkey further explained in his testimony, ICG's network consists of a centrally-located host switch (defined in the Local Exchange Routing Guide (LERG) as a combination Class 4/Class 5 switch) that supports other, individual switching nodes that are collocated either in BellSouth central offices or in customer locations. ICG's fiber optic ring connects these discrete switching nodes within its network and transfers traffic amongst those nodes. This is exactly the function that BellSouth's tandem switch serves in the BellSouth network. The fact that ICG is not required to place fully-featured Class 5 switches in each collocation does not detract from the fact that the ICG network performs exactly the same function as the BellSouth network; it simply uses a different architecture to accomplish the same tasks. This is exactly what the FCC envisioned in paragraph 1090 of the Local Competition First Report and Order when it directed state commissions to "...consider whether new technologies (e.g. fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem...."

ICG stated that the arguments of the Public Staff and BellSouth are premised on the faulty assumption that competing carriers must mimic the incumbents' network to qualify for the tandem interconnection rate. ICG believes that tandem rate eligibility depends solely on geographic service area comparability as expressly provided in Rule 51.711. However, even if the Commission were to conclude that functionality is a second requirement, the Commission could not conclude that identical functionality is the standard. The often quoted paragraph 1090 from the Local Competition First Report and Order expressly contemplates that competing carriers will employ different network architectures than those used by incumbents. In that Order, the FCC notes that new technologies may "perform functions similar - not identical - to those performed by incumbents' tandem switches."

ICG contended that the Public Staff is mistaken in its belief that ICG relies on the fact that its switch serves as a point of interconnection for interexchange carriers (IXCs) and an access point for operator services to establish the tandem status of ICG's switch. These two functions are included in a general description of tandem functionality. Witness Starkey testified that the ICG switch performs nearly all of the functions included in the tandem definition included in the LERG. Indeed, the LERG definition provides that a switch is defined as a tandem if it performs one or more of a list of functions. Witness Starkey testified that the ICG switch performed "nearly all" of the functions enumerated in the LERG. ICG reiterated, however, that no FCC rule or order makes inclusion of a switch in the LERG a requirement for tandem rate eligibility.

In conclusion, ICG stated it has met its burden of proving that its Charlotte switch serves an area comparable to that of BellSouth's tandem. ICG asserted that the record evidence on this issue is uncontroverted, and there is no basis to disturb the Commission's conclusion.

PUBLIC STAFF: The Public Staff did not address this issue in its Proposed Order. However, in its Response to Request for Reconsideration, the Public Staff stated that it now believes that the Commission should reconsider and reverse its finding on this issue on the grounds that ICG failed to demonstrate that its switch provides the tandem function in terminating a call delivered to it by a LEC.

The Public Staff indicated that by reading Paragraph 1090 of the FCC's First Report and Order in CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd 15499, as a whole, and as an indication of the FCC's intent in promulgating Rule 51.711, it is clear that the functionality of the interconnecting carrier's network must be considered for the purpose of determining whether the carrier should be compensated for tandem switching. The FCC specifically directs the states to consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an ILEC's tandem switch. If the only requirement were that the interconnecting carrier's switch serve an area comparable to the LEC's tandem switch, any consideration of the new technologies would be completely irrelevant.

The Public Staff contended that ICG's fiber ring is apparently a means of connecting its switch to its customers. Fiber rings can also be used to interconnect end office switches and to reroute traffic in the event that an interoffice circuit is cut. Such is the case with BellSouth. ICG's ring, on the other hand, does not extend between switches, but between ICG customers, and between ICG customers and the ICG switch from which dial tone is provided. Under normal circumstances, in the termination of a call delivered to ICG by BellSouth, the ICG ring does not perform a function even remotely similar to that of a tandem switch. It actually serves as the loop between the ICG switch, where end office switching is done, and the ICG customer. Tandem switching, if it was involved, would occur at the other end of the circuit, even before the call reached the end office from which dial tone is provided.

The Public Staff stated that ICG's assertions that its switch qualifies as a tandem because it serves as a point of interconnection for traffic to and from IXCs, and as ICG's access point for operator services for its customers are not persuasive. Even if these are considered tandem functions for some purposes, they have no bearing on the issue at hand unless they are actually employed in the process of terminating calls delivered to ICG by BellSouth. Since they are not so employed, they do not qualify ICG for tandem switching and transport compensation.

The Public Staff recommended that the Commission reconsider and reverse Finding of Fact No. 2 and Ordering Paragraph No. 2 of the RAO dated November 4, 1999.

The Public Staff also suggested that the Commission consider this issue in conjunction with its deliberations in the pending arbitration between BellSouth and ITC^DeltaCom in Docket No. P-500, Sub 10.

DISCUSSION

The difference in the positions of the parties appears to be due to ambiguity between the language in the FCC's discussion of this issue, Paragraph 1090, and the language in the FCC's Rule 51.711.

ICG's position is that the only relevant criterion is whether ICG's switch serves a geographic area comparable to that served by BellSouth's tandem as stated in Rule 51.711(a)(3). However, even if that is the only requirement, ICG believes that its switch performs the same functionality as BellSouth's tandem switch as discussed in Paragraph 1090 of the FCC's First Report and Order.

BellSouth's position is that the discussion of Rule 51.711 which addresses functionality must be considered as well as Rule 51.711(a)(3) and that ICG does not meet either requirement.

The Public Staff's position supports that of BellSouth.

Paragraph 1090 of the First Report and Order states:

> We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. *In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch.* (Emphasis added) Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate. (First Report and Order, CC Docket 96-98, Paragraph 1090) (August 6, 1996).

Rule 51.711(a)(3) states:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

On February 7, 2000, ICG and BellSouth filed maps in response to a Commission Order. BellSouth filed a map depicting the geographic coverage of BellSouth's local access and transport area (LATA) tandem switch and a map depicting BellSouth's local tandem switch in the Charlotte area. ICG filed a map showing ICG's Charlotte serving area. These maps are hereby allowed in evidence in this proceeding as late-filed exhibits.

The Commission is unpersuaded by the arguments of BellSouth and the Public Staff in this matter. The Commission believes, based on the evidence in the record, including the maps filed by the parties on February 7, 2000, that ICG has met its burden of proof that its switch serves a comparable geographic area to that served by BellSouth's tandem switch for the Charlotte serving area. Although such information may be both useful and relevant, the Commission can find no basis for BellSouth's argument that the location of actual customers is essential to support a finding that ICG's switch serves a geographic area comparable to the area served by BellSouth's tandem switch in either Paragraph 1090 or Rule 51.711 of the FCC's First Report and Order. The Commission believes that the testimony of ICG witness Starkey was more cogent and convincing than that of BellSouth witness Varner and that witness Starkey clearly demonstrated that the technologies employed by ICG's network provide functions that are the same as or similar to the functions performed by BellSouth's tandem switch and, in fact, meet both the criteria discussed in the parties' filings.

Since we are persuaded that ICG has demonstrated both geographic and functional capability in this case, we believe that it is unnecessary at this time to decide the question of whether both criteria must be satisfied in order for a CLP such as ICG to receive compensation at the tandem interconnection rate for reciprocal compensation purposes.

CONCLUSIONS

The Commission upholds and reaffirms its original decision and concludes that for reciprocal compensation purposes, based on the fact that ICG's Charlotte switch serves an area comparable to that served by BellSouth's Charlotte tandem switch and provides functionality the same as or similar to that provided by BellSouth's tandem switch, ICG is entitled to compensation at the tandem interconnection rate.

The Commission strongly advises parties involved in future arbitrations where inclusion of the tandem switch element for reciprocal compensation purposes is an issue to file maps showing their serving areas as compared to that of the ILEC serving area, along with substantial testimony including a description of the switch(es) and associated technology necessary to provide service; the number and location of customers, if available; and any other information relevant to capability or intent to serve.

IT IS, THEREFORE, ORDERED as follows:

1. That the Composite Agreement submitted by BellSouth and ICG is hereby approved, subject to such modifications as may be required by this Order.

2. That BellSouth and ICG shall revise the Composite Agreement in conformity with the provisions of this Order and shall file the revised Composite Agreement for review and approval by the Commission not later than 15 days from the date of this Order. Should no revisions be necessary to the Composite Agreement, the parties shall so advise the Commission not later than 15 days from the date of this Order.

3. That the Commission will entertain no further comments, objections, or unresolved issues with respect to issues previously addressed in this arbitration proceeding.

4. That the maps filed in this docket by BellSouth and ICG on February 7, 2000, be, and the same are hereby, admitted in evidence as late-filed exhibits.

ISSUED BY ORDER OF THE COMMISSION.

This the 1st day of March, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

bc030100.01

Testimony of James C. Falvey

Exhibit 4

(Information from Lucent web page showing multi-purpose nature of Lucent 5ESS switch, including end office and tandem functions)

EXHIBIT 4

news & info | solutions | international | careers | bell labs | site info

Switching Solutions

Lucent Technologies
Bell Labs Innovations

Access Solutions | Switching Solutions | 7R/E Packet Solutions | xDSL Portfolio
SITEMAP | CONTACT | HOME

Switching Solutions

- About Us
- Products & Services
- Technologies
- Customer Testimonials
- Industry Events
- News
- Technical Support
- Livenet Facility
- Int'l Presence
- SAS Ventures

Switching Solutions Navigator:

Switching Applications

The flexibility of the 5ESS Switch provides the ability to combine all service offerings on a single platform. Service providers can use one 5ESS Switch platform for popular communication applications such as Toll/Long Distance and Operator Services, as well as sophisticated data and video applications.

A wide range of services and applications are available on the 5ESS Switch, including:

- **Local Services** such as iCentrex, number portability, and ISDN Customer Premises Equipment (CPE) enhancements
- **Network Services** such as operator services, long distance/toll, and high capacity tandem and global gateway applications
- **Base Software** includes the ongoing release of new and enhanced software products, as well as the Rapid Software Delivery system which significantly speeds up the deployment of new feature releases to your network.

top

search switching solutions:

GO!

Lucent Home | Service Provider | Enterprise | Small to Mid Business | OEM | Business Partner | US Government | Investor

Testimony of James C. Falvey

Exhibit 5

("Texas Plan" of Performance Remedies)

EXHIBIT 5

ATTACHMENT 17: Performance Remedy Plan

This Attachment 17: Performance Remedy Plan sets forth the terms and conditions under which SWBT will report performance to CLEC and compare that performance to SWBT's own performance or benchmark criteria, whichever is applicable. This Attachment further provides for enforcement through liquidated damages and assessments.

1.0 SWBT agrees to provide CLEC a monthly report of performance for the performance measures listed in Appendix 1. SWBT will collect, analyze, and report performance data for these measures in accordance with SWBT's Performance Measurement Business Rules, as approved by the Texas Commission. Both the performance measures and the business rules are subject to modification in accordance with section 6.4 below regarding six month reviews. SWBT and CLEC further agree to use this two-tiered enforcement structure for performance measurements provided for in this Attachment. The Commission approved performance measurements shown in Appendix 1 hereto identify the measurements that belong to Tier-1 or Tier-2 categories, which are further, identified as the High, Low and Medium groups as those terms are used below.

1.1 SWBT will not levy a separate charge for provision of the data to CLEC called for under this Attachment. Upon CLEC's request, data files of CLEC's raw data, or any subset thereof, will be transmitted to CLEC. If CLEC's request is transmitted to SWBT on or before the last day of the month for which data is sought, SWBT shall provide the data to CLEC on or before 20th day of the month pursuant to mutually acceptable format, protocol, and transmission media. If CLEC's request is transmitted to SWBT after the last day of the month for which data is sought, SWBT shall provide the data to CLEC within 20 days of receipt pursuant to mutually acceptable format, protocol, and transmission media. Notwithstanding other provisions of this Agreement, the Parties agree that such records will be deemed Proprietary Information.

2.0 SWBT and CLEC agree to use a statistical test, namely the modified "Z-test," for evaluating the difference between two means (SWBT and CLEC) or percentages, or the difference in the two proportions for purposes of this Attachment. SWBT agrees to use the modified Z-tests as outlined below as the statistical tests for the determination of parity when the result for SWBT and the CLEC are compared. The modified Z-tests are applicable if the number of data points are greater than 30 for a given measurement. In cases where benchmarks are established, the determination of compliance is through the comparison of the measured performance delivered to the CLEC and the applicable benchmark. For testing compliance for measures for which the number of data points are 29 or less, although the use of permutation tests as outlined below is appropriate comparison of performance delivered to CLECs with SWBT performance as described in Alternative-1 under the "Qualifications to use Z-Test" heading below is preferred.

3.0 SWBT and CLEC concur that, for purposes of this Attachment, performance for the CLEC on a particular measure will be considered in compliance with the parity requirement when the measured results in a single month (whether in the form of means, percents, or proportions) for the same measurement, at equivalent disaggregation, for both SWBT and CLEC are used to calculate a Z-test statistic and the resulting value is no greater than the critical Z-value as reflected in the Critical Z-statistic table shown below.

Z-Test:

SWBT agrees with the following formulae for determining parity using Z-Test:

For Measurement results that are expressed as Averages or Means: $z = (DIFF) / \delta_{DIFF}$

Where;
$DIFF = M_{ILEC} - M_{CLEC}$
M_{ILEC} = ILEC Average
M_{CLEC} = CLEC Average
$\delta_{DIFF} = SQRT\,[\delta^2_{ILEC}\ (1/n_{CLEC} + 1/n_{ILEC})]$
δ^2_{ILEC} = Calculated variance for ILEC.
n_{ILEC} = number of observations or samples used in ILEC measurement
n_{CLEC} = number of observations or samples used in CLEC measurement

For Measurement results that are expressed as Percentages or Proportions:

Step 1:

$$\rho = \frac{(n_{ILEC}P_{ILEC} + n_{CLEC}P_{CLEC})}{n_{ILEC} + n_{CLEC}}$$

Step 2:

$$\sigma_{PILEC\text{-}PCLEC} = sqrt[[\rho(1-\rho)]/n_{ILEC} + [\rho(1-\rho)]/n_{CLEC}]$$

Step 3:

$$Z = (P_{ILEC} - P_{CLEC})/\sigma_{PILEC\text{-}PCLEC}$$

Where: n = Number of Observations
P = Percentage or Proportion

For Measurement results that are expressed as Rates or Ratio:

$$z = (DIFF) / \delta_{DIFF}$$

Where;
$DIFF = R_{ILEC} - R_{CLEC}$
$R_{ILEC} = num_{ILEC}/denom_{ILEC}$
$R_{CLEC} = num_{CLEC}/denom_{CLEC}$
$\delta_{DIFF} = SQRT\,[R_{ILEC}\ (1/denom_{CLEC} + 1/denom_{ILEC})]$

4.0 Qualifications to use Z-Test:

The proposed Z- tests are applicable to reported measurements that contain 30 or more data points.

In calculating the difference between the performances the formula proposed above applies when a larger CLEC value indicates a higher quality of performance. In cases where a smaller CLEC value indicates a higher quality of performance the order of subtraction should be reversed (i.e., $M_{CLEC} - M_{ILEC}$, $P_{CLEC} - P_{ILEC}$, $R_{CLEC} - R_{ILEC}$).
For measurements where the applicable performance criterion is a benchmark rather than parity performance compliance will be determined by setting the denominator of the Z-test formula as one in calculating the Z-statistic.

For measurements where the performance delivered to CLEC is compared to SWBT performance and for which the number of data points are 29 or less, SWBT agrees to application of the following alternatives for compliance.

4.1 Alternative 1:

For measurements that are expressed as averages, performance delivered to a CLEC for each observation shall not exceed the ILEC averages plus the applicable critical Z-value. If the CLEC's performance is outside the ILEC average plus the critical Z-value and it is the second consecutive month, SWBT can utilize the Z-test as applicable for data sets of 30 or greater data points or the permutation test to provide evidence of parity. If SWBT uses the Z-test for data sets under 30, the CLEC can independently perform the permutation test to validate SWBT's results. SWBT will supply all data required to perform the permutation test, including the complete ILEC and CLEC data sets for the measure, to CLEC upon request. The results of the permutation test will control over the results of the Z-test analysis as applicable for data sets 30 or greater.

For measurements that are expressed as percentages, the percentage for CLEC shall not exceed ILEC percentage plus the applicable critical Z-value. If the CLEC's performance is outside the ILEC percentage plus the critical Z-value and it is the second consecutive month, SWBT can utilize the Z-test as applicable for data sets of 30or greater data points or the permutation test to provide evidence of parity. If SWBT uses the Z-test for data sets under 30, the CLEC can independently perform the permutation test to validate SWBT's results. SWBT will supply all data required to perform the permutation test, including the complete ILEC and CLEC data sets for the measure, to CLEC upon request. The results of the permutation test will control over the results of the Z-test analysis as applicable for data sets 30 or greater.

4.2 Alternative 2:

Permutation analysis will be applied to calculate the z-statistic using the following logic:

Choose a sufficiently large number T.

Pool and mix the CLEC and ILEC data sets

Randomly subdivide the pooled data sets into two pools, one the same size as the original CLEC data set (n_{CLEC}) and one reflecting the remaining data points, (which is equal to the size of the original ILEC data set or n_{ILEC}).

Compute and store the Z-test score (Z_S) for this sample.

Repeat steps 3 and 4 for the remaining T-1 sample pairs to be analyzed. (If the number of possibilities is less than 1 million, include a programmatic check to prevent drawing the same pair of samples more than once).

Order the Z_S results computed and stored in step 4 from lowest to highest.

Compute the Z-test score for the original two data sets and find its rank in the ordering determined in step 6.

Repeat the steps 2-7 ten times and combine the results to determine P = (Summation of ranks in each of the 10 runs divided by 10T)

Using a cumulative standard normal distribution table, find the value Z_A such that the probability (or cumulative area under the standard normal curve) is equal to P calculated in step 8.

Compare Z_A with the desired critical value as determined from the critical Z table. If Z_A > the designated critical Z-value in the table, then the performance is non-compliant.

4.3 SWBT and CLEC will provide software and technical support as needed by Commission Staff for purposes of utilizing the permutation analysis. Any CLEC who opts into this Attachment 17 agrees to share in providing such support to Commission Staff.

5.0 Overview of Enforcement Structure

5.1 SWBT agrees with the following methodology for developing the liquidated damages and penalty assessment structure for tier-1 liquidated damages and tier-2 assessments:

5.2 SWBT will pay Liquidated Damages to the CLEC according to the terms set forth in this Attachment.

5.3 Liquidated damages apply to Tier-1 measurements identified as High, Medium, or Low on Appendix -1.

5.4 Assessments are applicable to Tier-2 measures identified as High, Medium, or Low on Appendix -1 and are payable to the Texas State Treasury.

5.5 SWBT will not be liable for the payment of either Tier 1 damages or Tier 2 assessments until the Commission approves an Interconnection Agreement between a CLEC and SWBT containing the terms of Attachment 17 of this Agreement. Tier 2 assessments will be paid only on the aggregate performance for CLECs that have adopted this Attachment (Performance Remedy Plan) and are operating in Texas.

6.0 <u>Procedural Safeguards and Exclusions</u>

6.1 SWBT agrees that the application of the assessments and damages provided for herein is not intended to foreclose other noncontractual legal and regulatory claims and remedies that may be available to a CLEC. By incorporating these liquidated damages terms into an interconnection agreement, SWBT and CLEC agree that proof of damages from any "noncompliant" performance measure would be difficult to ascertain and, therefore, liquidated damages are a reasonable approximation of any contractual damage resulting from a non-compliant performance measure. SWBT and CLEC further agree that liquidated damages payable under this provision are not intended to be a penalty.

6.2 SWBT's agreement to implement these enforcement terms, and specifically its agreement to pay any "liquidated damages" or "assessments" hereunder, will not be considered as an admission against interest or an admission of liability in any legal, regulatory, or other proceeding relating to the same performance. SWBT and CLEC agree that CLEC may not use: (1) the existence of this enforcement plan; or (2) SWBT's payment of Tier-1 "liquidated damages" or Tier-2 "assessments" as evidence that SWBT has discriminated in the provision of any facilities or services under Sections 251 or 252, or has violated any state or federal law or regulation. SWBT's conduct underlying its performance measures, and the performance data provided under the performance measures, however, are not made inadmissible by these terms. Any CLEC accepting this performance remedy plan agrees that SWBT's performance with respect to this remedy plan may not be used as an admission of liability or culpability for a violation of any state or federal law or regulation. Further, any liquidated damages payment by SWBT under these provisions is not hereby made inadmissible in any proceeding relating to the same conduct where SWBT seeks to offset the payment against any other damages a CLEC might recover; whether or not the nature of damages sought by the CLEC is such that an offset is appropriate will be determined in the related proceeding. The terms of this paragraph do not apply to any proceeding before the Commission or the FCC to determine whether SWBT has met or continues to meet the requirements of section 271 of the Act.

6.3 SWBT shall not be liable for both Tier-2 "assessments" and any other assessments or sanctions under PURA or the Commission's service quality rules relating to the same performance.

6.4 Every six months, CLEC may participate with SWBT, other CLECs, and Commission representatives to review the performance measures to determine whether measurements should be added, deleted, or modified; whether the applicable benchmark standards should be modified or replaced by parity standards; and whether to move a classification of a measure to High, Medium, Low, Diagnostic, Tier-1 or Tier-2. The criterion for reclassification of a measure shall be whether the actual volume of data points was lesser or greater than anticipated. Criteria for review of performance measures, other than for possible reclassification, shall be whether there exists an omission or failure to capture intended performance, and whether there is duplication of another measurement. Performance measures for 911 may be examined at any six month review to determine whether they should be reclassified. The first six-month period will begin when an interconnection agreement including this remedy plan is adopted by a CLEC and approved by the Commission. Any changes to existing performance measures and this remedy plan shall be by mutual agreement of the parties and, if necessary, with respect to new measures and their appropriate classification, by arbitration. The current measurements and benchmarks will be in effect until modified hereunder or expiration of the interconnection agreement.

6.5 SWBT and CLEC acknowledge that no later than two years after SWBT or its affiliate receives Section 271 relief, the Commission's intention is to reduce the number of performance measures subject to damages and assessments by 50% to the extent there is a smaller number of measures that truly do capture all of the issues that are competition-affecting and customer-affecting

6.6 CLEC and SWBT will consult with one another and attempt in good faith to resolve any issues regarding the accuracy or integrity of data collected, generated, and reported pursuant to this Attachment. In the event that CLEC requests such consultation and the issues raised by CLEC have not been resolved within 45 days after CLEC's request for consultation, then SWBT will allow CLEC to have an independent audit conducted, at CLEC's expense, of SWBT's performance measurement data collection, computing, and reporting processes. In the event the subsequent audit reinforces the problem identified during the 45 days of consultation period or if any new problem is identified, SWBT shall reimburse a CLEC any expense incurred by the CLEC for such audit. CLEC may not request more than one audit per twelve calendar months under this section. This section does not modify CLEC's audit rights under other provisions of this Agreement. SWBT agrees to inform all CLECs of any problem identified during the audit initiated by any CLEC.

7.0 Exclusions Limited

7.1 SWBT shall not be obligated to pay liquidated damages or assessments for noncompliance with a performance measurement if, but only to the extent that, such noncompliance was the result of any of the following: a Force Majeure event; an act or omission by a CLEC that is contrary to any of its obligations under its interconnection agreement with SWBT or under the Act or Texas law; or non-SWBT problems associated with third-party systems or equipment, which could not have been avoided by SWBT in the exercise of reasonable diligence. Provided, however, the third party exclusion will not be raised more than three times within a calendar year. SWBT will not be excused from payment of liquidated damages or assessments on any other grounds, except by application of the procedural threshold provided for below. Any dispute regarding whether a SWBT performance failure is excused under this paragraph will be resolved with the Commission through a dispute resolution proceeding under Subchapter Q of its Procedural Rules or, if the parties agree, through commercial arbitration with the American Arbitration Association. SWBT will have the burden in any such proceeding to demonstrate that its noncompliance with the performance measurement was excused on one of the grounds set forth in this paragraph. If a Force Majeure event or other excusing event recognized in the first sentence of this section 7.1 only suspends SWBT's ability to timely perform an activity subject to performance measurement, the applicable time frame in which SWBT's compliance with the parity or benchmark criterion is measured will be extended on an hour-for-hour or day-for-day basis, as applicable, equal to the duration of the excusing event.

7.2 In addition to the provisions set forth herein, SWBT shall not be obligated to pay liquidated damages or assessments for noncompliance with a performance measure if the Commission finds such noncompliance was the result of an act or omission by a CLEC that is in bad faith, for example, unreasonably holding orders and/or applications and "dumping" such orders or applications in unreasonably large batches, at or near the close of a business day, on a Friday evening or prior to a holiday, or unreasonably failing to timely provide forecasts to SWBT for services or facilities when such forecasts are required to reasonably provide such services or facilities; or non-SWBT Y2K problems.

7.3 CLEC acknowledges that an overall cap of $120 million per year for Tier-1 liquidated damages and Tier-2 Assessments will apply to payments by SWBT under all SWBT interconnection agreements that include Attachment 17 in the form set forth herein. CLEC further acknowledges that a monthly cap of $10 million for Tier-1 liquidated damages will apply to payments by SWBT under all SWBT interconnection agreements that include Attachment 17 in the form set forth herein. To the extent in any given month the $10 million cap is not reached, the subsequent month's cap will be increased by an amount equal to the unpaid portion of the previous month's cap. At the end of the year, if total Tier-1 liquidated damages and Tier-2 Assessments equal or exceed $120 million but SWBT has paid less than $120 million because of the $10 million per month cap, SWBT shall be required to pay the total $120 million. In such event, Tier-1 liquidated damages shall be paid first on a pro rata basis to CLECs, and any remainder within the overall cap of $120 million, shall be paid as a Tier-2 Assessment. In the event the total calculated amount of damages and assessments for the year is less than $120 million, SWBT shall be obligated to pay ONLY the actual calculated amount of damages and assessments. The cap will be based upon a calendar year beginning the first day of the month following Commission approval of the Texas 271 Agreement.

7.3.1 Whenever SWBT Tier-1 payments to an individual CLEC in a month exceed $ 3 million, or for all CLECs Tier-1 payments (in a month) exceed $ 10 million, then SWBT may commence a show cause proceeding as provided for below. Upon timely commencement of the show cause proceeding, SWBT must pay the balance of damages owed in excess of the threshold amount into escrow, to be held by a third party pending the outcome of the show cause proceeding. To invoke these escrow provisions, SWBT must file with the Commission, not later than the due date of the affected damages payments, an application to show cause why it should not be required to pay any amount in excess of the procedural threshold. SWBT's application will be processed in an expedited manner under Subchapter Q of the Commission's Procedural Rules. SWBT will have the burden of proof to demonstrate why, under the circumstances, it would be unjust to require it to pay liquidated damages in excess of the applicable threshold amount. If SWBT reports non-compliant performance to a CLEC for three consecutive months on 20% or more of the measures reported to the CLEC, but SWBT has incurred no more than $ 1 million in liquidated damages obligations to the CLEC for that period under the enforcement terms set out here, then the CLEC may commence an expedited dispute resolution under this paragraph pursuant to Subchapter Q of the Commission's Procedural Rules. In any such proceeding the CLEC will have the burden of proof to demonstrate why, under the circumstances, justice requires SWBT to pay damages in excess of the amount calculated under these enforcement terms.

7.3.2 SWBT should post on its Internet website the aggregate payments of any liquidated damages or assessments.

7.4 With respect to any interconnection agreement, SWBT and any CLEC may request two expedited dispute resolution proceedings pursuant to the two preceding paragraphs before the Commission or, if the parties agree, through commercial arbitration with the American Arbitration Association (AAA); during the term of the contract without having to pay attorneys fees to the winning company. For the third proceeding and thereafter, the requesting party must pay attorneys fees, as determined by the Commission or AAA, if that party loses.

7.5 In the event the aggregate amount of Tier-1 damages and Tier-2 assessments reach the $120 million cap within a year and SWBT continues to deliver non-compliant performance during the same year to any CLEC or all CLECs, the Commission may recommend to the FCC that SWBT should cease offering in-region interLATA services to new customers.

8.0 Tier-1 Damages:

Tier-1 liquidated damages apply to measures designated in Attachment–1 as High, Medium, or Low when SWBT delivers "non-compliant" performance as defined above.

8.1 Under the damages for Tier-1 measures, the number of measures that may be classified as "non-compliant" before a liquidated damage is applicable is limited to the K values shown below. The applicable K value is determined based upon the total number of measures with a sample size of 10 or greater that are required to be reported to a CLEC where a sufficient number of observations exist in the month to permit parity conclusions regarding a compliant or non-compliant condition. For any performance measurement, each disaggregated category for which there are a minimum of 10 data points constitutes one "measure" for purposes of calculating K value. The designated K value and the critical Z-value seek to balance random variation, Type-1 and Type-2 errors. Type-1 error is the mistake of charging an ILEC with a violation when it may not be acting in a discriminatory manner (that is, providing non-compliant performance). Type-2 error is the mistake of not identifying a violation when the ILEC is providing discriminatory or non-compliant performance.

8.2 Liquidated damages in the amount specified in the table below apply to all "non-compliant" measures in excess of the applicable "K" number of exempt measures. Liquidated damages apply on a per occurrence basis, using the amount per occurrence taken from the table below, based on the designation of the measure as High, Medium, or Low in Appendix-1 and the number of consecutive months for which SWBT has reported noncompliance for the measure. For those measures listed on Appendix-2 as "Measurements that are subject to per occurrence damages or assessments with a cap," the amount of liquidated damages in a single month shall not exceed the amount listed in the table below for the "Per measurement" category. For those measures listed on Appendix -2 as "Measurements that are subject to per measure damages or assessment," liquidated damages will apply on a per measure basis, at the amounts set forth in the table below. The methodology for determining the order of exclusion, and the number of occurrences is addressed in "Methods of calculating the liquidated damages and penalty amounts," below.

LIQUIDATED DAMAGES TABLE FOR TIER-1 MEASURES

Per occurrence						
Measurement Group	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 and each following month
High	$150	$250	$500	$600	$700	$800
Medium	$75	$150	$300	$400	$500	$600
Low	$25	$50	$100	$200	$300	$400

Per Measure/Cap*						
Measurement Group	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 and each following month
High	$25,000	$50,000	$75,000	$100,000	$125,000	$150,000
Medium	$10,000	$20,000	$30,000	$40,000	$50,000	$60,000
Low	$5,000	$10,000	$15,000	$20,000	$25,000	$30,000

ASSESSMENT TABLE FOR TIER-2 MEASURES

Per occurrence

Measurement Group	
High	$500
Medium	$300
Low	$200

Per Measure/Cap*

Measurement Group	
High	$75,000
Medium	$30,000
Low	$20,000

* **For per occurrence with cap measures, the occurrence value is taken from the per occurrence table, subject to the per measure with cap amount.**

9.0 **Tier-2 Assessments to the State:**

9.1 Assessments payable to the Texas State Treasury apply to the Tier-2 measures designated on Appendix -1 as High, Medium, or Low when SWBT performance is out of parity or does not meet the benchmarks for the aggregate of all CLEC data. Specifically, if the Z-test value is greater than the Critical Z, the performance for the reporting category is out of parity or below standard.

9.2 For those Measurements where a per occurrence assessment applies, an assessment as specified in the Assessment Table; for each occurrence is payable to the Texas State Treasury for each measure that exceeds the Critical Z-value, shown in the table below, for three consecutive months. For those Measurements listed in Appendix -2 as measurements subject to per occurrence with a cap, an assessment as shown in the Assessment Table above for each occurrence with the applicable cap is payable to the Texas State Treasury for each measure that exceeds the Critical Z-value, shown in the table below, for three consecutive months. For those Tier-2 Measurements listed in Appendix -2 as subject to a per measurement assessment an assessment amount as shown in the Assessment Table above is payable to the Texas State Treasury for each measure that exceeds the Critical Z-value, shown in the table below, for three consecutive months.

9.3 The following table will be used for determining the Critical Z-value for each measure , as well as the K values referred to below based on the total number of measures that are applicable to a CLEC in a particular month. The table can be extended to include CLECs with fewer performance measures. The Critical Z-value for Tier 2 will be calculated in the same manner as for Tier 1.[1]

Critical Z - Statistic Table

Number of Performance Measures	K Values	Critical Z-value
1	0	1.65
2	0	1.96
3	0	2.12
4	0	2.23
5	0	2.32
6	0	2.39
7	0	2.44
8	1	1.69
9	1	1.74
10-19	1	1.79
20-29	2	1.73
30-39	3	1.68
40-49	3	1.81
50-59	4	1.75
60-69	5	1.7

[1] This sentence is added to clarify the manner in which Critical-Z value is calculated.

70 – 79	6	1.68
80 – 89	6	1.74
90 – 99	7	1.71
100 – 109	8	1.68
110 – 119	9	1.7
120 – 139	10	1.72
140 – 159	12	1.68
160 – 179	13	1.69
180 – 199	14	1.7
200 – 249	17	1.7
250 – 299	20	1.7
300 – 399	26	1.7
400 – 499	32	1.7
500 – 599	38	1.72
600 – 699	44	1.72
700 – 799	49	1.73
800 – 899	55	1.75
900 – 999	60	1.77
1000 and above	Calculated for Type-1 Error Probability of 5%	Calculated for Type-1 Error Probability of 5%

10.0 <u>General Assessments</u>:

10.1 If SWBT fails to submit performance reports by the 20th day of the month, the following assessments apply unless excused for good cause by the Commission:

If no reports are filed, $5,000 per day past due;
If incomplete reports are filed, $1,000 per day for each missing performance results.

10.2 If SWBT alters previously reported data to a CLEC, and after discussions with SWBT the CLEC disputes such alterations, then the CLEC may ask the Commission to review the submissions and the Commission may take appropriate action. This does not apply to the limitation stated under the section titled "Exclusions Limited."

10.3 When SWBT performance creates an obligation to pay liquidated damages to a CLEC or an assessment to the State under the terms set forth herein, SWBT shall make payment in the required amount on or before the 30th day following the due date of the performance measurement report for the month in which the obligation arose (e.g., if SWBT performance through March is such that SWBT owes liquidated damages to CLECs for March performance, or assessments to the State for January – March performance, then those payments will be due May 15, 30 days after the April 15 due date for reporting March data). For each day after the due date that SWBT fails to pay the required amount, SWBT will pay interest to the CLEC at the maximum rate permitted by law for a past due liquidated damages obligation and will pay an additional $3,000 per day to the Texas State Treasury for a past due assessment.

10.4 SWBT may not withhold payment of liquidated damages to a CLEC, for any amount up to $3,000,000 a month, unless SWBT had commenced an expedited dispute resolution proceeding on or before the payment due date, asserting one of the three permitted grounds for excusing a damages payment below the procedural threshold (Force Majeure, CLEC fault, and non-SWBT problems associated with third-party systems or equipment). In order to invoke the procedural threshold provisions allowing for escrow of damages obligations in excess of $ 3,000,000 to a single CLEC (or $ 10,000,000 to all CLECs), SWBT must pay the threshold amount to the CLEC(s), pay the balance into escrow, and commence the show cause proceeding on or before the payment due date.

10.5 CLEC will have access to monthly reports on performance measures and business rules through an Internet website that includes individual CLEC data, aggregate CLEC data, and SWBT's data.

10.6 The cap provided in Section 7.3 does not apply to assessments under Section 10 of this Attachment.

11.0 <u>Methods of Calculating the Liquidated Damage and Assessment Amounts</u>

The following methods apply in calculating per occurrence liquidated damage and assessments:

11.1 <u>Tier-1 Liquidated Damages</u>

11.1.1 <u>*Application of K Value Exclusions*</u>

Determine the number and type of measures with a sample size greater than 10 that are "non-compliant" for the individual CLEC for the month, applying the parity test and bench mark provisions provided for above. Sort all measures having non-compliant classification with a sample size greater than 10 in ascending order based on the number of data points or transactions used to develop the performance measurement result (e.g., service orders, collocation requests, installations, trouble reports). Exclude the first "K" measures designated Low on Appendix -1, starting with the measurement results having the fewest number of underlying data points greater than 10. If all Low measurement results with a non-compliant designation are excluded before "K" is exceeded, then the exclusion process proceeds with the Medium measurement results and thereafter the High measurement results. If all Low, Medium and High measurements are excluded, then those measurements with sample sizes less than 10 may be excluded until "K" measures are reached. In each category measurement results with non-compliant designation having the fewest underlying data point are then excluded until either all non-compliant measurement results are excluded or "K" measures are excluded, whichever occurs first. For the remaining non-compliant measures that are above the K number of measures, the liquidated damages per occurrence are calculated as described further below. (Application of the K value may be illustrated by an example, if the K value is 6, and there are 7 Low measures and 1 Medium and 1 High which exceed the Critical Z-value, the 6 Low measures with the lowest number of service orders used to develop the performance measure are not used to calculate the liquidated damages, while the remaining 1 Low measure, 1 Medium measure, and 1 High measure which exceed the critical Z-value are used.) In applying the K value, the following qualifications apply to the general rule for excluding measures by progression from measures with lower transaction volumes to higher. A measure for which liquidated damages are calculated on a per measure basis will not be excluded in applying the K value unless the amount of liquidated damages payable for that measure is less than the amount of liquidated damages payable for each remaining measure. A measure for which liquidated damages are calculated on a per occurrence basis subject to a cap will be excluded in applying the K value whenever the cap is reached and the liquidated damages payable for the remaining non-compliant measures are greater than the amount of the cap.

11.1.2 Calculating Tier-1 Liquidated Damages

11.1.2.1 Measures for Which the Reporting Dimensions are Averages or Means.

Step 1: Calculate the average or the mean for the measure for the CLEC that would yield the Critical Z-value. Use the same denominator as the one used in calculating the Z-statistic for the measure. (For benchmark measures, calculate the value that would yield the critical Z-value by adding or subtracting the critical Z-value to the benchmark as appropriate, subject to 4.0 and the Business Rules.).

Step 2: Calculate the percentage difference the between the actual average and the calculated average.

Step 3: Multiply the total number of data points by the percentage calculated in the previous step and the per occurrence dollar amount taken from the Liquidated Damages Table to determine the applicable liquidated damages for the given month for that measure.

11.1.2.2 Measures for Which the Reporting Dimensions are Percentages.

Step 1: Calculate the percentage for the measure for the CLEC that would yield the Critical Z-value. Use the same denominator as the one used in calculating the Z-statistic for the measure. (For benchmark measures, calculate the value that would yield the critical Z-value by adding or subtracting the critical Z-value to the benchmark as appropriate, subject to 4.0 and the Business Rules.).

Step 2: Calculate the difference between the actual percentage for the CLEC and the calculated percentage.

Step 3: Multiply the total number of data points by the difference in percentage calculated in the previous step and the per occurrence dollar amount taken from the Liquidated Damages Table to determine the applicable liquidated damages for the given month for that measure.

11.1.2.3 Measures for Which the Reporting Dimensions are Ratios or Proportions.

Step 1: Calculate the ratio for the measure for the CLEC that would yield the Critical Z-value. Use the same denominator as the one used in calculating the Z-statistic for the measure.

Step 2: Calculate the percentage difference between the actual ratio for the CLEC and the calculated ratio.

Step 3: Multiply the total number of data points by the percentage calculated in the previous step and the per occurrence dollar amount taken from the Liquidated Damages Table to determine the applicable liquidated damages for the given month for that measure.

12.2 Tier Two Liquidated Damages

12.2.1 Determine the Tier-2 measurement results, such as High, Medium, or Low that are non-compliant for three consecutive months for all CLECs, or individual CLEC if the measure is not reported for all CLECs.

If the non-compliant classification continues for three consecutive months, an additional assessment will apply in the third month and in each succeeding month as calculated below, until SWBT reports performance that meets the applicable criterion. That is, Tier-2 assessments will apply on a "rolling three month" basis, one assessment for the average number of occurrences for months 1-3, one assessment for the average number of occurrences for months 2-4, one assessment for the average number of occurrences for months 3-5, and so forth, until satisfactory performance is established.

12.2.2 Measures for Which the Reporting Dimensions are Averages or Means.

Step 1: Calculate the average or the mean for the measure for the CLEC that would yield the Critical Z-value for the third consecutive month. Use the same denominator as the one used in calculating the Z-statistic for the measure. (For benchmark measures, calculate the value that would yield the Critical Z-value by adding or subtracting the Critical Z-value to the benchmark as appropriate, subject to 4.0 and the Business Rules.).

Step 2: Calculate the percentage difference between the actual average and the calculated average for the third consecutive month.

Step 3: Multiply the total number of data points by the percentage calculated in the previous step. Calculate the average for three months and multiply the result by $500, $300, and $200 for Measures that are designated as High, Medium, and Low respectively; to determine the applicable assessment payable to the Texas State Treasury for that measure.

12.2.3 Measures for Which the Reporting Dimensions are Percentages.

Step 1: Calculate the percentage for the measure for the CLEC that would yield the Critical Z-value for the third consecutive month. Use the same denominator as the one used in calculating the Z-statistic for the measure. (For benchmark measures, calculate the value that would yield the critical Z-value by adding or subtracting the Critical Z-value to the benchmark as appropriate, subject to 4.0 and the Business Rules.).

Step 2: Calculate the difference between the actual percentage for the CLEC and the calculated percentage for each of the three non-compliant months.

Step 3: Multiply the total number of data points for each month by the difference in percentage calculated in the previous step. Calculate the average for three months and multiply the result by $500, $300, and $200 for measures that are designated as High, Medium, and Low respectively; to determine the applicable assessment for that measure.

12.2.4 Measures for Which the Reporting Dimensions are Ratios or Proportions.

Step 1: Calculate the ratio for the measure for the CLEC that would yield the Critical Z-value for the third consecutive month. Use the same denominator as the one used in calculating the Z-statistic for the measure. (For benchmark measures, calculate the value that would yield the Critical Z-value by adding or subtracting the Critical Z-value to the benchmark as appropriate, subject to 4.0 and the Business Rules.).

Step 2: Calculate the percentage difference between the actual ratio for the CLEC and the calculated ratio for each month of the non-compliant three-month period.

Step 3: Multiply the total number of service orders by the percentage calculated in the previous step for each month. Calculate the average for three months and multiply the result by $500, $300, and $200 for measures that are designated as High, Medium, and Low respectively; to determine the applicable assessment for that measure.

13.0 <u>**This Section Intentionally Left Blank**</u>

14.0 Attached hereto, and incorporated herein by reference, are the following Appendices:

Appendix 1: Measurements Subject to Per Occurrence Damages or Assessment with a Cap and Measurements Subject to Per Measure Damages or Assessment

Appendix 2: Performance Measures Subject to Tier-1 and Tier-2 Damages Identified as High, Medium and Low

Appendix 3: Performance Measurement Business Rules (Version 1.6)